78-1522

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF UTAH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Solicitor General, on behalf of the Secretary of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 586 F.2d 756. The opinion of the district court (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*) was entered on August 8, 1978. A petition for rehearing was denied on December 6, 1978 (App. E, *infra*). On February 27, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including April 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether public lands withdrawn from all forms of private appropriation and placed within a federal grazing district may be selected by a State in lieu of lost school-grant lands without first being classified as available for that purpose by the Secretary of the Interior pursuant to his discretionary authority under Section 7 of the Taylor Grazing Act.

2. Whether the Secretary, in the exercise of such discretion, may decline to classify as open to selection lands which are "grossly disparate" in value to the lost school lands.

STATUTES INVOLVED

The relevant statutes are:

1. Section 6 of the Utah Enabling Act of July 16, 1894, ch. 138, 28 Stat. 109;

2. Sections 2275 and 2276 of the Revised Statutes, as amended, 43 U.S.C. 851-852; and

3. Section 7 of the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1272, 43 U.S.C. 315f.

These provisions are reproduced in the Appendix, *infra*, pages 1a-9a.

STATEMENT

1. Like most western states, upon admission to the Union Utah received grants of public lands for school purposes. See P. Gates, *History of Public Land Law Development* 288-318 (1968). Utah was specially favored, however, in being granted four sections in every township, instead of the usual two. Utah Enabling Act of July 16, 1894, ch. 138, Section 6, 28 Stat. 109, *infra*, App. 1a.[1] Originally, school grants were valid only if, upon survey, the designated section was believed to be "non-mineral" in character. Utah claimed exemption from that rule, but lost. *United States* v. *Sweet*, 245 U.S. 563 (1918). A decade later, however, Congress changed the law to validate the earlier grants of sections "in place" notwithstanding the land was mineral. Act of January 25, 1927, ch. 57, 44 Stat. 1026-1027. In the particular case of Utah, that was a very significant change which, indirectly, gives rise to the present case, in which Utah claims indemnity lands to replace some 245 lost sections said to be mineral in character.

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[1] This no doubt accounts in part for the comparatively large number of acres still unselected by Utah before 1965. See note 9, *infra*.

Long before the school grants to Utah, Congress had provided for the case where such grants were lost to the State because the designated sections were fractional or because, before a survey was approved, the lands "in place" were appropriated by settlers, disposed of to others, or set aside as part of a federal reservation. In all such eventualities, the State was entitled to select other "unappropriated" public lands of equal acreage. R.S. 2275-2276. The Utah Enabling Act itself made a like provision for selection of lands in lieu of lost school grants. Act of July 16, 1894, Section 6, 28 Stat. 109.[2] These "indemnity" or "lieu" selections could not, until 1958, include mineral land. *E.g.*, 43 U.S.C. (1952 ed.) 852. But, in 1958, the ground rules were changed once more, and henceforth mineral land could be selected provided the original lost section was also mineral in character. Pub. L. No. 85-771, Section 2, 72 Stat. 928-929, now 43 U.S.C. 852(a)(1), *infra*, App. 3a-4a. The present claim is premised on the indemnity selection statute, as thus amended.

2. Between September 1965 and November 1971, the State of Utah selected 194 parcels of public land of the United States in Uintah County, Utah, comprising 157,255.90 acres (Fdg. 4, App. 56a, *infra*). The tracts designated are 640-acre survey sections,

[2] Notwithstanding the indemnity selection provision of the Enabling Act, Congress amended the general indemnity statute for Utah's benefit by stipulating that references to sections 16 and 36 should, in the case of Utah, be read to embrace also sections 2 and 32. Act of May 3, 1902, ch. 683, section 2, 32 Stat. 189, 43 U.S.C. 853.

except for three large parcels each comprising about 11,000 or 12,000 acres. All the lands selected are located within federal grazing districts established pursuant to Section 1 of the Taylor Grazing Act of 1934, 43 U.S.C. 315 (Fdg. 12, App. 68a, *infra*). Included within the 194 selected parcels are Tracts U-a and U-b, each 5,120 acres, which, since April 1974, are the subject of prototype oil-shale leases issued by the Secretary to third parties (Fdg. 5, App. 61a, *infra*).[3] As of May 1976, total leasing revenues from Tracts U-a and U-b amounted to $48,291,-840. *Ibid.* Sums in excess of $72 million have now accumulated. All the remaining selections are said to be of mineral lands, chosen in lieu of an equal acreage of lost school land grants which the State claims were also mineral in character. The accuracy of these representations is still to be determined, but may be assumed for present purposes.

In February 1974, the Secretary of the Interior made the following announcement in a letter to the Governor of Utah (R. 70):

> As you know, the Department of the Interior has not as yet acted upon the State's applications [for the 194 parcels]. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. § 315f (1972), the Department may refuse to

[3] A description of the Interior Department's prototype oil-shale leasing program was published. 38 Fed. Reg. 33186 (1973); 39 Fed. Reg. 7475 (1974); 39 Fed. Reg. 11208 (1974).

convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.

In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate at this time to advise you that we will apply the above-mentioned policy in that adjudication.

Two weeks later, the State filed the present suit against the Secretary.

3. The State's complaint sought title to the 194 parcels selected or, alternatively, an order directing the Secretary to approve or disapprove the State's selections without reference to any disparate values between the selected and "base" or lost lands. In due course, the parties entered into a stipulation identifying the contested issues of law in the case: (a) whether the State's selections could be effective unless the identified lands were first classified by the Secretary, pursuant to Section 7 of the Taylor Grazing Act, as suitable for satisfaction of school indemnity selection rights; and, if not, (b) whether,

in making the required classification, the Secretary may consider the "comparative values" of the selected lands and the lost sections; and (c) whether such a classification constitutes a "major Federal action" under Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), with the possibility that an environmental impact statement would have to be prepared. Thereafter, both sides cross-moved for summary judgment.[4]

On June 8, 1976, the district court issued its findings of fact, conclusions of law, and judgment (App. 54a-79a, *infra*). The Secretary was directed to complete a "ministerial, administrative adjudication" resulting in "a determination as to whether those selection lists [comprising the 194 selected parcels] are in factual compliance with the requirements of

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[4] In addition, the State sought an order requiring the Secretary to pay the oil-shale leasing receipts from Tracts U-a and U-b into the registry of the district court during the pendency of this case. In due course, the court entered orders to this effect, instructing its clerk to deposit equal portions of the impounded leasing receipts with four Salt Lake City banks, by them to be invested in 90-day Treasury bills. On appeal, those orders were affirmed. In our opinion, this action of the district court contravenes the provisions of Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. 191, which requires the Secretary of the Interior to deposit these receipts into the Treasury so that regular distributions of them may be made to particular recipients. We also believe the district court was without jurisdiction to impound these funds. *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976); *National Ass'n of Regional Councils* v. *Costle*, 564 F.2d 583, 589-590 (D.C. Cir. 1977). Nevertheless, because the question does not appear to have recurring importance, we do not present it for review here.

43 U.S.C. 852, and to refrain from applying any measure of comparative or disparate value between the base lands and the selected lands * * *" (App. 77a, *infra*).[5] The district court further held that classification under Section 7 of the Taylor Grazing Act was not required with respect to lands selected by the State pursuant to Section 852, and that the Secretary's contrary regulations were "void." Finally, the court concluded that the National Environmental Policy Act was inapplicable (Concl. 9, App. 74a, *infra*).[6]

On appeal by the Secretary, the Tenth Circuit affirmed the district court's judgment in its entirety. The court of appeals took the view that the school land grant statutes must be treated as "*special acts* completely separate and apart from all other public land grant enactments * * * and given special, independent treatment * * *" (App. 40a, *infra*). The court went on to stress that the "*purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the 'public land' states*" (App. 13a, *infra*), concluding that this "solemn bilateral agreement between the United States and the 'Land Grant' State of Utah" conferred upon Utah the "unqualified, unambiguous *right* * * * to select 'in lieu' school indemnity lands which are 'mineral in character' for the specific school lands granted which are 'mineral in character' but lost to the State" (App. 48a, *infra*). The State's right of selection was held to override the Secretary's discretion under Section 7 of the Taylor Grazing Act to classify lands as open to selection. The primary conclusion was that Section 7 is inapplicable to the processing of state indemnity selections (App. 39a, *infra*). Alternatively, the court held that, in this context, Section 7 classification is not discretionary and may not take into account the comparative values of "base" and selected lands (App. 49a, *infra*).

[5] The judgment originally provided that this administrative adjudication be completed no later than December 15, 1976. However, the district court later stayed this requirement pending appeal to the court of appeals. To date, neither court has entered any subsequent order setting any new deadline.

[6] The impounded oil-shale leasing receipts from Tracts U-a and U-b would "be paid to the party entitled thereto pursuant to the further Order of this Court, when this litigation is fully and finally concluded on the merits" (App. 79a, *infra*). Until then, the district court's management of the impounded leasing receipts was to continue.

REASONS FOR GRANTING THE PETITION

The decision below effectively directs the Secretary of the Interior to approve the indemnity selections filed by the State of Utah—all apparently for mineral lands, including some 10,000 acres presently leased under a prototype oil-shale exploration program—provided only three conditions are satisfied: (1) that the "lost" school grant sections (or "base" lands) were "mineral in character"; (2) that the "lieu" lands selected have not previously been disposed of to others or reserved for a specific purpose (such as an Indian or military reservation); and (3) that the total acreage of the lieu lands does not

exceed that of the lost lands. According to the court of appeals, once these bare prerequisites are met, the Secretary must issue a patent to the State, no matter how gross the disparity between the value of the lost lands and that of the indemnity lands selected in lieu, and no matter what other public reasons might argue against approval of the State's selections. The court holds that the Secretary enjoys no discretion to withhold approval of a selection because of gross disparity in value or on any other ground.

The decision affects substantial acreage in several western States, and, if left undisturbed, will prove quite costly to the United States. It also threatens to have a severe disruptive effect on the management of the public domain. The ruling is without warrant in the relevant legislation. Moreover, it overturns half a century of consistent administrative practice, on which other States have relied. The decision is at odds with the congressional understanding, only recently expressed in unequivocal terms. And, finally, the result is wholly inconsistent with the underlying policy of the indemnity statutes to provide the States a rough equivalent for lost school sections, not an opportunity for a hugely profitable trade.

1. The practical consequences of this novel ruling are difficult to confine. The financial loss to the United States is very substantial. Lease revenues derived from the two oil-shale tracts selected by Utah already exceed $72 million. Even larger sums are presently being collected from lessees under the same program in Colorado, and that State presumably will

now be free to select those lands.[7] There remain, in addition, more than half a million acres to be selected in the western States in lieu of lost school sections. If, in each case, the most valuable mineral or timber land can be chosen, without regard to the value of the lost acres, the total predictable disparity must amount to several hundreds of millions of dollars.[8]

Nor are monetary considerations necessarily the most important. The Department of the Interior has critical responsibilities for managing the public domain in a consistent and rational way, accommodating the many aspects of the public interest involved. The development of new energy sources must be encouraged, but without ignoring conservation needs or overriding recreational, scenic and other environmental values. The oil-shale leasing program, for example, is carefully tailored to respect these concerns. Plainly, the Department's task cannot successfully be performed without a substantial degree of control over alienations from the public domain. That has been recognized at least since President Roosevelt's

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[7] The successful bidders on the two Colorado tracts already leased under the prototype oil-shale leasing program are committed to pay the United States, in addition to production royalties, some $328 million. The comparable total for the Utah tracts is in excess of $120 million.

[8] The condition already noticed (*supra*, page 4) that mineral land can be selected only if the lost sections were likewise "mineral in character" is a very limited check on disparity, given the large variation in the value of the many deposits that qualify as "mineral." See, *e.g.*, *Layman* v. *Ellis*, 52 Interior Dec. 714 (1929); cf. *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604 (1978).

general withdrawal order of 1934. Exec. Order No. 6910, 54 Interior Dec. 539 (1934). The present decision, exempting State indemnity selections from the Secretary's discretionary classification authority, threatens the best management of the public domain. Of course, the right of the States to select indemnity lands must be respected. But it is entirely possible to satisfy those claims without depriving the Secretary of all authority to take into account the public interest for which he is responsible.

2. The present decision, it is true, is not in direct conflict with the ruling of any other court. This is, we suggest, because it has so long and so generally been accepted that the relevant statutes afford the Secretary of the Interior a substantial measure of discretion in approving State indemnity selections. But it does not follow that the ruling below is a "sport" in the law that may be left to be gradually eroded by contrary decisions. As it happens, all of the acreage remaining to be selected in lieu of original school grants lies within the boundaries of only two circuits.[9] For this reason, and to avoid unequal treatment, the Secretary may deem himself required to follow the rule of the present case in both the Ninth and Tenth Circuits if the judgment below becomes final. Accordingly, we cannot await the development of a conflict of decisions. As a practical matter, the

[9] The States with outstanding school indemnity selection rights and the approximate acreage involved are: Arizona, 170,000 acres; California, 180,000 acres; Colorado, 17,000 acres; Idaho, 27,000 acres; Montana, 22,900 acres; Utah, 225,000 acres; and Wyoming, 1,100 acres.

occasion for asking this Court's review is now or never.

3. As we have said, the decision below is wholly inconsistent with the long-settled administrative practice, expressly endorsed by the Congress. Nor do the relevant statutes compel disregard of the established rule. On the contrary, we read the critical provisions as confirming the Secretary's discretion.

(a) The provisions that grant to States the right to make indemnity selections of land in lieu of lost school sections are today codified at 43 U.S.C. 851-852 (*infra*, App. 2a). The court of appeals thought those provisions dispositive. But they are, at best, ambiguous as to whether lands within a Taylor Grazing Act district (as all Utah's selections concededly are) remain available for selection without further action by the Secretary of the Interior.

Section 851 announces that the right to indemnity selection arises whenever the school section originally granted has been lost to the State by private settlement, by other disposition from the United States, or because "before title could pass to the State" the lands have been "included within such Indian, military, or *other reservation*" (emphasis added).[10] And, as one would expect, it is provided that "such selec-

[10] It has long been settled that the original grants of numbered sections do not take effect until approval of a final survey and that an intervening settlement, disposal or reservation of the lands defeats the grant "in place." *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 93 U.S. 634 (1876); *United States* v. *Morrison*, 240 U.S. 192 (1916); *United States* v. *Wyoming*, 331 U.S. 440 (1947).

tions may not be made within the boundaries of said reservation." The Utah Enabling Act itself contains comparable provisions. Act of July 16, 1894, ch. 138, Section 6, 28 Stat. 109, *infra*, App. 1a.[11] Thus, when Section 852(a) says that indemnity selections may be made from "any unappropriated * * * public lands within the State," we know that lands "reserved" by the United States are deemed "appropriated" and therefore unavailable for selection.[12] And it is plain that any federal "reservation" that would defeat an original school grant will likewise prevent indemnity selection of such withdrawn lands. What is not wholly clear on the face of these provisions, however, is whether all "withdrawals" remove lands from the selection pool. Is it only a withdrawal for a specific purpose, such as creation of a national park, that renders the lands unavailable for selection?[13]

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[11] Indeed, the Enabling Act may be more explicit in applying the same rule in all cases, including temporary withdrawals. It *first* exempts from both the original grant and indemnity selection "*permanent* reservations for national purposes," and then *adds*: "nor shall any lands embraced in Indian, military, *or other reservations of any character* be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain" (emphasis added). *Infra*, App. 1a.

[12] This is now indirectly confirmed in Section 852(d)(1), which provides that lands as to which only the mineral rights have been "withdrawn" will be deemed "unappropriated" for the purposes of the indemnity selection statute. *Infra*, App. 7a.

[13] Notwithstanding the contrary implications in the opinion of the court of appeals, it is clear that lands which are lawfully appropriated or included in a special reservation at any time before the indemnity selection is made and filed are thereby removed from the selection pool. See *Wyoming* v. *United States*, 255 U.S. 489 (1921). Accordingly, in this case, any qualifying withdrawal made before 1965 would render the affected lands unavailable for selection, absent a release of such lands by reclassification.

(b) The answer to the question just posed was assumed in the negative as early as *Wyoming* v. *United States*, 255 U.S. 489 (1921), the case so much relied upon by the court below. What was there at issue was the effectiveness of a "temporary" withdrawal of lands as potentially mineral under the Pickett Act of June 25, 1910 (43 U.S.C. (1970 ed.) 141). The State prevailed, not because such a withdrawal was insufficient, but only because the indemnity selections had been filed well *before* the withdrawal. See 255 U.S. at 495, 508-509. See, also, *Payne* v. *Central Pac. Ry. Co.*, 255 U.S. 228, 234, 236, 237-238 (1921). If any doubt remained, it was put to rest by *United States* v. *Wyoming*, 331 U.S. 440 (1947), where a Pickett Act withdrawal of lands, without the creation of any special-purpose reservation, was held to defeat an original school grant. *Id.* at 442 and n.4, 444, 456. See, also, *State of Utah* v. *Work*, 6 F.2d 675, aff'd on independent grounds, 273 U.S. 649 (1926). That rule governs here since, as we have seen, any withdrawal that prevents an Enabling Act grant from attaching likewise (perhaps a fortiori) removes the lands from indemnity selection.

This brings us to the general withdrawal of November 1934. By Executive Order No. 6910, the Presi-

dent, expressly invoking the Pickett Act and following its terms *verbatim*, withdrew and "reserved for classification" under the recently enacted Taylor Grazing Act all "vacant, unreserved and unappropriated public land" in certain States, including Utah. 54 Interior Dec. at 540. Although labelled "temporary," the order remains in force today.[14] The effect of this action—as the court of appeals itself at one point seems to agree (Pet. App. 16a)[15]—would seem to have been to prevent any further indemnity selections except as land was "reclassified" for that purpose. That is what has always been understood. See Solicitor's Opinion of February 8, 1935, 55 Interior Dec. 205, 210-211; *State of Arizona*, 55 Interior Dec. 249, 253 (1935); *State of Arizona*, 59 Interior Dec. 317, 321-322 (1946); *State of California*, 59 Interior Dec. 451 (1947); *State of California*, 67 Interior Dec. 85 (1960); *State of Utah*, 71 Interior Dec. 392 (1964). See, also, 42 OP. ATT'Y. GEN. 173, 180-181 (1963). Indeed, the withdrawal was deemed so effective that, absent remedial legislation, the Secretary found no authority to release any part of the affected lands for State indemnity selection. See 59 Interior Dec. at 321.

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[14] Although the Pickett Act was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, that statute expressly provides that previous Pickett Act withdrawals shall remain in "full force and effect until modified." Section 701(c), 90 Stat. 2786.

[15] Later, however, the court holds that "nothing in [this order] can be construed to apply to state school indemnity selections." App. 51a, *infra*.

(c) The Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269 (now 43 U.S.C. 315 *et seq.*), authorized the Secretary of the Interior to place in grazing districts "pending its final disposal" any public land not already dedicated to specified purposes. Section 1, 43 U.S.C. 315. Much of the land withdrawn by Executive Order 6910 a few months later was ultimately included in grazing districts, and this evidently happened in the case of Utah. As already noted, however, there was no mechanism for unlocking such withdrawn lands, except for homesteading. See Section 7, 48 Stat. 1272. That problem was solved two years later by an amendment to Section 7. Act of June 26, 1936, ch. 842, Section 2, 49 Stat. 1976, 43 U.S.C. 315f, *infra*, App. 8a. This critical enactment provided, *inter alia*:

> That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910) * * *, or within a grazing district, which are * * * proper for acquisition in satisfaction of any outstanding lieu * * * rights or land grant, and to open such lands to * * * selection * * * for disposal in accordance with such classification under applicable public-land laws, * * *. Such lands shall not be subject to disposition * * * until after the same have been classified and opened to entry: * * * *Provided*, that upon the application of any applicant qualified to make * * * selection * * * under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such

> application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to * * * select * * * such lands if opened to entry as herein provided.

On its face this amendment embraces State lieu selection rights, and that is how it has been administered. States applying for indemnity lands were required to file a petition for discretionary classification under this Section. This is reflected in regulations published in 1943 "to show the change in procedure," 8 Fed. Reg. 7284 (1943), and continued to this day. 43 C.F.R. 2400-3(a), 2450.1, 2621.2(a). Indeed, if Section 7 of the Taylor Grazing Act were inapplicable, it is difficult to appreciate under what authority the Secretary can approve a State selection of lands still withdrawn.

(d) There seems to be some suggestion in the opinion of the court of appeals that, whatever the Secretary's discretionary authority may have been before, it was removed by recent amendments to the indemnity selection statutes. App. 16a, *infra*. Emphasis is placed on the retention of the acre-for-acre formula, with no mention of comparable value, except only that selection of mineral land is conditioned on the lost land also being "mineral in character." See 43 U.S.C. 852(a)(1), as added by the Act of August 27, 1958, Pub. L. No. 85-771, 72 Stat. 928, *infra*, App. 4a.

The fact is, however, that nothing in the amendments to Section 852 releases withdrawn land (as opposed to minerals separately reserved) for indemnity selection or affects the Secretary's classification

discretion with respect to such lands under Section 7 of the Taylor Grazing Act. On the contrary, the legislative history of both the 1958 and the 1960 amendments to the indemnity selection statutes makes it quite clear that nothing has changed in these respects. Thus, in 1958, the report of the relevant House Committee (H.R. Rep. No. 2347, 85th Cong., 2d Sess. 2 (1958)) stated:

> The Department of the Interior noted its assumption "that nothing in this bill is intended to affect the rights or duties of States under other laws" and, in particular, "that no change is intended to be made in section 7 of the Taylor Grazing Act, as amended (43 U.S.C., sec. 315f)." The Committee on Interior and Insular Affairs concurs.[16]

The reference to Section 7 of the Taylor Grazing Act in connection with a bill dealing only with State indemnity selections is not unequivocal. But any ambiguity was removed in 1960 when, considering a further amendment of Section 851 (Act of Sept. 4, 1960, Pub. L. No. 86-786, 74 Stat. 1024), the same Committee unequivocally said (H.R. Rep. No. 2110, 86th Cong., 2d Sess. 2 (1960)):

> * * * [A] selection by a State can be consummated only if the land selected is classified by the Secretary of the Interior as proper for acquisition in satisfaction of an outstanding lieu

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[16] See, also, S. Rep. No. 1735, 85th Cong., 2d Sess. 2, 4, 11 (1958), which incorporates Interior Department letters to the same effect.

right, as provided in section 7 of the Taylor Grazing Act (43 U.S.C., sec. 315f).

* * * * *

* * * The prohibition against the selection of producing and producible lands subject to lease or permit would be continued. So also would the Taylor Grazing Act provisions referred to above.

(e) We need go no further. A fair reading of the relevant texts at least permits the construction that Sections 851 and 852 at all times prevented the selection by States in lieu of their lost school sections of lands withdrawn for any purpose, however general, until and unless the Secretary of the Interior, pursuant to his discretionary authority under the Taylor Grazing Act, agreed to classify them as available for such selection. That has been the undeviating administrative practice for almost half a century, and, as such, entitled to special weight. *Udall* v. *Tallman*, 380 U.S. 1, 19 (1965). And, finally, Congress, having "revisited the Act * * *[,] left the practice untouched," indeed expressly endorsed it. See *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974); *Board of Governors* v. *First Lincolnwood Corp.*, No. 77-832 (Dec. 11, 1978), slip op. 14. See also *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1, 23-24 (1976); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970).

4. The remaining question is whether the Secretary of the Interior has permissibly exercised his discretion under Section 7 of the Taylor Grazing Act by declining to classify as available for indemnity

selection lands of grossly disparate value to the lost school sections.

(a) On the face of the statute, the Secretary would seem to be wholly free to refuse to classify particular land in any particular way. Presumably, the words "in his discretion" at the head of Section 7 qualify all that follows. Thus, in cases not involving State indemnity selections, the courts have recognized a broad discretion in the Secretary. *E.g.*, *Finch* v. *United States*, 387 F.2d 13 (10th Cir. 1967), cert. denied, 390 U.S. 1012 (1968); *Pallin* v. *United States*, 496 F.2d 27, 34 (9th Cir. 1974). And one court has expressly held that "the market value of the lands being classified" properly may be considered as part of the "broad powers and manifold options" of Section 7 discretion. *Boothe* v. *Hickel*, 347 F. Supp. 1273, 1276 (D. Nev. 1969), aff'd *sub nom. Bronken* v. *Morton*, 473 F.2d 790, 797-798 (9th Cir.), cert. denied, 414 U.S. 828 (1973).

It is not obvious why that approach is not equally applicable here. We may assume that the Secretary would be abusing his discretion if he refused to classify as available sufficient lands to satisfy outstanding State indemnity selections. So, also, he might be faulted if he approved selections only when the lieu lands were *less* valuable than the lost sections. But the Secretary cannot be charged with any such questionable action. The rule he has adopted is simply to insist on rough equivalence, permitting the States to gain a modest advantage but not an unconscionable one. Nor is there any suggestion that

the formula prevents the States with outstanding selection rights from fully satisfying them and enjoying a meaningful choice in exercising those rights.

Finally, the Secretary is not rewriting the indemnity selection statutes in imposing a value criterion. Of course, the "acre-for-acre" and "mineral-for-mineral" provisions of Sections 851 and 852 must be observed, once that statute takes hold. But, before Sections 851 and 852 can apply at all, withdrawn land must be unlocked, and, in making that classification decision, the Secretary must exercise the discretion expressly conferred upon him by Section 7 of the Taylor Grazing Act. Plainly, unless classification authority is entirely meaningless, the Secretary cannot be bound to approve every selection that satisfies Sections 851 and 852. He might reasonably apply public interest criteria other than, or in addition to, monetary value equivalence. But there can be no proper complaint about the modest rule against gross disparity in value at issue here.

(b) Again, the rule applied to Utah is not a novel deviation from previous practice. At least since 1965, the Department of the Interior has consistently followed a policy of refusing to classify as available for indemnity selection lands of "grossly disparate value" to the lost acreage. Nor is this a vague, undefined standard. The precise formula now employed was articulated in January 1967 (R. 50):

> * * * If the estimated value of the "selected lands" is more than $100 per acre, then the values will not be considered grossly disparate

> if the value of the "selected lands" exceeds the value of the "base lands" by less than $100 per acre or by 25% of the value of the "base land," whichever is greater."

And, here also, the Department's practice has won congressional approval. In January 1974, Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, joined by Senator Metcalf, the Chairman of the Subcommittee on Minerals, Materials and Fuels, wrote the Secretary of the Interior concerning the prototype oil shale leasing program and its relation to State indemnity selections. On behalf of the Committee, the Senators expressed concern about the very applications involved in this case and endorsed the Department's policy of barring selections of grossly disparate value:

> There is one further complicating factor with respect to the Department's [oil shale leasing] program. That is the pending State indemnity selection applications filed by the State of Utah, for 157,000 acres of Federal land in Utah. We understand that these selections include the two Utah tracts the Department intends to lease as part of the prototype program.
>
> We are well aware of the longstanding controversy over selection of "mineral-rich" lands by the States in satisfaction of their statehood

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[17] It should be noted, however, that the formula does not exclude the exercise of discretion. The memorandum goes on to provide:

> If such estimate exceeds these limits, the case will be submitted to Washington for evaluation of all the circumstances.

grants. We agree with the policy adopted by the Department in 1965 that State selections should not be allowed where there is a "gross disparity" of value between the lost lands and the selected lands. If you intend to change that policy, we request that you notify this Committee before opening any "mineral-rich" lands to selection.

In any event, it seems to us that the Department should decide the state selection question before going ahead with the prototype program. It is our understanding that if the State of Utah takes title to these oil shale lands, that it intends to offer them for development. Any large scale development on these lands would appear totally inconsistent with the objectives of the Department's prototype program.[18]

(c) After the opening of "mineral-rich" lands to State selection in 1958, a proper concern for the national public interest prompted the Department of the Interior to look to comparable values in considering State indemnity selections. This is no grudging implementation of the congressional decision. Rather, insistence on rough value equivalence in lieu selections carries out the legislative purpose to offer a fair replacement for lost grants, not an opportunity for profiteering. We may surmise that Congress left it to the Secretary to prevent abuses within the very wide limits left by the acre-for-acre and mineral-for-mineral guidelines. Certainly, he was acting well

[18] *Oil Shale Leasing: Hearings on S. 2418 Before the Senate Subcomm. on Minerals, Materials and Fuels,* 94th Cong., 2d Sess. 26 (1976).

within the ambit of his statutory discretion. In our submission, the courts below misread the controlling provisions and failed to accord the weight due to well-established administrative practice, known to the Congress and expressly endorsed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1979

APPENDIX A

STATUTES INVOLVED

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1. *Utah Enabling Act*

Section 6 of the Utah Enabling Act of July 16, 1894, ch. 138, 28 Stat. 109:

> That upon the admission of said State [of Utah] into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have ben sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reser-

vation shall have been extinguished and such lands be restored to and become a part of the public domain.

2. *School Indemnity Selection Statutes*

Sections 2275 and 2276 of the Revised Statutes, as restated and revised by Sections 1 and 2 of Act of August 27, 1958, Pub. L. No. 85-771, 72 Stat. 928-929, and as thereafter amended, 43 U.S.C. 851-852:

SEC. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes [43 U.S.C. 852], by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in

lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing herein contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

SEC. 2276. (a) The lands appropriated by section 2275 of the Revised Statutes [43 U.S.C. 851], shall be selected from any unappropriated, surveyed or unsurveyed public lands within the

State where such losses or deficiencies occur subject to the following restrictions:

(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection.

(4) If a selection is consummated as to a portion but not all of the lands subject to any mineral lease or permit, then, as to such portion and for so long only as such lease or permit or any lease issued pursuant to such permit shall remain in effect, there shall be automatically reserved to the United States the mineral or minerals for which the lease or permit was issued, together with such further rights as may be necessary for the full and complete enjoyment of all rights, privileges and benefits under or with respect to the lease or permit: *Provided,*

however, That after approval of the selection the Secretary of the Interior shall determine what portion of any rents and royalties accruing thereafter which may be paid under the lease or permit is properly applicable to that portion of the land subject to the lease or permit selected by the State, the portion applicable being determined by applying to the sum of the rents and royalties the same ratio as that existing between the acreage selected by the State and the total acreage subject to the lease or permit; of the portion applicable to the selected land 90 per centum shall be paid to the State by the United States annually and 10 per centum shall be deposited in the Treasury of the United States as miscellaneous receipts.

(5) If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he would have had or might have enjoyed had the selection not been made and approved, the State shall succeed to all the rights of the United States under the lease or permit

as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit.

(b) Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

(c) Notwithstanding the provisions of the Act of September 27, 1944 (58 Stat. 748), as amended (43 U.S.C., sec. 282) on the revocation not later than 10 years after the date of approval of this Act, of any order of withdrawal, in whole or in part, the order or notice taking such action shall provide for a period of not less than six months before the date on which

it otherwise becomes effective in which the State in which the lands are situated shall have a preferred right of application for selection under this section, subject to the requirements of existing law, except as against the prior existing valid settlement rights and preference rights conferred by existing law other than the said Act of September 27, 1944, or as against equitable claims subject to allowance and confirmation, and except where a revocation of an order of withdrawal is made in order to assist in a Federal land program.

(d)(1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327, of April 15, 1930, if otherwise available for selection; and the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

(2) The determination, for the purposes of this section of the mineral character of lands lost to a State shall be made as of the date of application for selection and upon the basis of the best evidence available at that time.

3. *Taylor Grazing Act*

Section 7 of the Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1272, as amended by the Act of June 26, 1936, ch. 842, Section 2, 49 Stat. 1976, 43 U.S.C. 315f:

> The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided,* That locations and entries under the mining laws including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restrictions or limitation by any provision of this subchapter. Where such lands are located within grazing districts reasonable notice shall be given by

> the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided,* That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1839

[Filed August 8, 1978]

STATE OF UTAH, by and through
its Division of State Lands, APPELLEE

v.

THOMAS S. KLEPPE, individually and as Secretary of
the Interior of the United States, APPELLANT

Appeal from the United States District Court for the
District of Utah, Central Division

(D.C. No. C-74-64)

Submitted: April 20, 1978

Carl Strass, Attorney, Appellate Section, Justice Department, Washington, D.C. (Peter R. Taft, Assistant Attorney General, Ramon M. Child, United States Attorney, Salt Lake City, Utah, and Raymond N.

Zagone, Gerald S. Fish and Dirk D. Snel, Department of Justice, Washington, D.C., on the brief) for Appellant.

Richard L. Dewsnup, Special Assistant Attorney General, Salt Lake City, Utah, (Vernon B. Romney, Utah Attorney General, Robert B. Hansen, Deputy Attorney General, Dallin W. Jensen, Assistant Attorney General, and Clifford L. Ashton, Special Assistant Attorney General, Salt Lake City, Utah, on the brief) for Appellee.

Amicus Curiae:

Frank J. Allen of Clyde and Pratt, Salt Lake City, Utah, for Amicus Justheim Petroleum Company.

Guy G. Hurlbutt, Deputy Attorney General of Idaho, (Wayne L. Kidwell, Attorney General of Idaho, and Peter E. Heiser, Jr., Chief Deputy Attorney of Idaho, on the brief), for Amicus State of Idaho.

Before MCWILLIAMS, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

The United States, by and through the Secretary of the Interior (Secretary) appeals from a summary judgment granted in favor of the appellee, State of Utah (Utah) enjoining the Secretary to approve or disapprove no later than December 15, 1976 (since stayed) Utah's school land grant "indemnity selec-

tions" of 194 parcels of public lands embracing approximately 157,255.90 acres situated in Uintah County, State of Utah. The surveyed "indemnity selections" or "lieu lands" are for school land grants-in-place which were denied Utah because of federal preemption, private entry prior to survey, or before title could pass to the state.

The historical background leading to Congressional enactment of the state school land grant statutes should aid in lending perspective to the legislative intent.

There were no federal lands within the borders of the original thirteen states when they adopted and ratified the United States Constitution. Thus, virtually all of the lands within their borders were subject to taxation, including taxation necessary for the maintenance of their public school systems. When other states were subsequently admitted into the Union, their territorial confines were "carved" from federal territories. The "public lands" owned and reserved by the United States within those territorial confines were not subject to taxation. This reservation by the United States created a serious impediment to the "public land" states in relation to an adequate property tax base necessary to permit these states to operate and maintain essential governmental services, including the public school systems. *It was in recognition thereof, i.e., in order to "equalize" the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific*

purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the "public land" states. The nature of the Congressional land grant program was "bilateral" in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.

Large quantities of the public domain have been granted by the Congress to the various states either for general or specific purposes. Many of these grants are unrestricted. None, to our knowledge, involve the trust covenants attendant with the state school land grant statutes. A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. Alabama v. Schmidt, 232 U.S. 168 (1914). The school land grant and its acceptance by the state constitutes a solemn compact between the United States and the state for the benefit of the state's public school system. State of Nebraska v. Platte Valley Power and Irr. Dist., 23 N.W.2d 300 (Neb. 1946), 166 A.L.R. 1196. A state accepting the school land grant must abide its duty as trustee for the benefit of the state's public school system. This duty applies with equal force to those specific school lands granted or those lands selected by the state as indemnity or lieu lands.

The indemnity or lieu "selections" by a state arise if any of the lands within the specific congressional grant (usually of sections 16 and 36 in each township) are not available by reason of pre-existing rights of others. McCreery v. Haskell, 119 U.S. 327 (1886).

The material facts in the case at bar were stipulated and are not in dispute. Following all pleadings, including the stipulation and pre-trial order, the respective parties moved for summary judgment pursuant to Fed. Rules Civ. Proc., rule 56, 28 U.S.C.A. The trial court entertained oral arguments and considered extensive briefs prior to entry of its Findings of Fact, Conclusions of Law and Decree on June 8, 1976. The trial court held that the discretion to be exercised by the Secretary in acting upon Utah's school land indemnity selection lists is confined to the narrow range set forth in 43 U.S.C.A. §§ 851 and 852. On appeal, the Secretary contends that the trial court erred in not finding that his discretion is very broad pursuant to Section 7 of the Taylor Grazing Act, 43 U.S.C.A. § 315f. A recital of the background leading to the instant dispute should aid our review.

Section 6 of the Enabling Act of Utah, approved July 16, 1894, 28 Stat. 107, grants to Utah sections 2, 16, 32, and 36 in every township in the State for the support of the common schools. It further provides that Utah may select other lands in lieu of those sold or otherwise disposed of.

Congress provided under 43 U.S.C.A. § 851 (R.S. § 2775; Feb. 28, 1891, c. 384, 26 Stat. 796, et seq.)

that whenever title to any of the school sections granted to the State of Utah did not pass because of federal pre-emption (reservation) or private entry (homestead settlements), Utah was entitled to ". . . *other lands of equal acreage* [*which*] *are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852* . . . ." (Emphasis supplied.) Confusion reigned as a result of language contained in the Homestead Act of 1862 [Ch. 75, 12 Stat. 392] which limited *land entries* thereunder to "non-mineral lands." Subsequent mining legislation provided that federal mineral lands were expressly reserved *from sale* except as otherwise expressly directed. The Department of the Interior adopted an administrative interpretation that "known mineral lands" were excluded "by implication" in the Utah Enabling Act. This interpretation was upheld by the Supreme Court in the case of United States v. Sweet, 245 U.S. 563 (1918) where the Court held that because the Utah Enabling Act of July 16, 1894, did not make specific mention of mineral lands that the school section grant was not intended to embrace land known to be valuable for "known minerals." This was changed by the Congress under the Act of January 25, 1927, 44 Stat. 1026-1027, as amended, 43 U.S.C. §§ 870, 871 which specifically provided that ". . . the several grants to the States of numbered sections in place for the support or in aid of the common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been

granted to and/or selected by and certified or approved, to any State or States as indemnity or in lieu of any land so granted by numbered sections," and "the grant of numbered mineral sections under this section (§ 870) shall be of the same effect as prior grants for the numbered non-mineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered non-mineral sections." Notwithstanding this legislation, however, Utah was denied title to mineral lands in relation to in-lieu selections resulting from vast withdrawals or other actions taken to make the public lands unavailable for in-lieu selections. The problem appeared to have been resolved in Utah's favor, however, by the passage of 1958 and 1966 amendments to 43 U.S.C. § 852 (Act of August 27, 1958, 72 Stat. 928; Act of June 24, 1966, 80 Stat. 220), following which the statute read:

> 43 U.S.C.A. § 852 Selections to supply deficiencies of school lands
>
> (a) The lands appropriated by section 851 of this title, shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:
>
> (1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

> (2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made to indemnify for lands on such a structure lost to the State because of appropriation before title could pass to the State; and . . . .

The 194 "in lieu" selection parcels selected by Utah in the instant case were made following the aforesaid Congressional amendments to 43 U.S.C. § 852, *supra*. Accordingly, Utah was entitled to select "in lieu" lands mineral in character *if* the base lands lost to the state were also mineral in character. At oral argument, it was agreed that the 194 "in lieu" selections by Utah were made following Utah's determination, through use of its expertise, that the base lands lost were "mineral in character" and that the selected "in lieu" lands were likewise "mineral in character." We deem it important here to observe that apparently at the time of the selections by Utah *none* of the "base lands" lost and *none* of the "in lieu" lands selected were productive of oil, gas or other minerals. Thus, no contention is presented that any of the lands were "in areas of known geologic structures," or, if so, that any of Utah's in-lieu selections would prejudice pre-existing rights of the United States. It is Utah's contention, then, that the sole and exclusive determination to be made by the Secretary is confined to the ministerial matter of determining whether the base lands lost and the "in lieu" lands selected are "mineral in character" and equal in average. Utah argues, accordingly, that the Secretary is confined to a ministerial review of Utah's selection lists based

upon the "mineral in character" criteria and the attendant acre-for-acre measurement, pursuant to the Utah Enabling Act and the provisions of 43 U.S.C. §§ 851, 852. The Secretary contends that pursuant to Section 7 of the Taylor Grazing Act (43 U.S.C. § 315f) he has much broader discretion, *i.e.*, he may "classify" the 194 "in lieu" parcels on the basis of "value-for-value" against the base lands lost to Utah, apparently predicated primarily on the "mineral in character" criteria.

In answer to Utah's allegation in its Complaint filed in the district court that the base lands lost were "mineral in character" the Secretary averred that he lacked sufficient information with which to form a belief; he alleged that he had not made any determination that "lieu lands" were mineral in character. To our knowledge, no such determination has yet been made, even though Utah commenced submitting its selection lists in 1965, the last of which were submitted November 10, 1971.

At oral argument, counsel for the Secretary contended that the Secretary *may* determine, within the broad spectrum of the right to "classify" the "in lieu" lands pursuant to Section 7 of the Taylor Grazing Act, *supra*, to conduct extensive investigations to determine the nature, value, and extent of the non-produced "mineral in character" aspects of both the lost "base lands" and the "in lieu" lands selected in order to ascertain that the "base lands" are of *equal value* to the "in lieu" lands selected. At no time or in anywise has the Secretary seen fit to inform the State of Utah, the district court or this court just how this determination is to be undertaken. Thus, at this time, it seems that we can safely relate —based upon the arguments presented and the record before us—that the criteria, processes and methods for determination of the "equal value" urged by the Secretary are non-existent, or otherwise so vague as to presently fall within the realm of guesswork or speculation. We believe that it is most unlikely that Congress intended to vest such discretion in the Secretary in light of the historical background leading to the enactment of the "in lieu" statutes heretofore referred to. The procedure prior to the Secretary's interpretation of the applicability of Section 7, *supra*, was that once a state submitted the indemnity selection list identifying the character and description of both the base lands for which indemnity is sought and the identity of the selected lands that the Secretary proceeds to publish notice providing any adverse claimant of the right to challenge the selections prior to execution of a "Clear List" document by which the Secretary certifies that (a) the lands designated as base lands in a selection list were properly categorized and described by the state and (b) the selected lands were in fact unappropriated federal public domain on the date the selection list was filed.

The Act of May 3, 1902, 32 Stat. 188, 43 U.S.C.A. § 853 provides that all of the provisions of §§ 851 and 852, relating to the selection of lands for educational purposes and indemnity therefor are made applicable to the State of Utah.

Whereas land grants generally are to be construed favorably to the Government and nothing is held to pass except that conveyed in clear language, (United States v. Union Pacific Railroad Company, 353 U.S. 112 (1957)), legislation enacted by the Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. State of Wyoming v. United States, 255 U.S. 489 (1921). We deem this to be particularly significant in recognition that the sole specific Congressional reference in § 852(a)(1), *supra*, relates to lands ". . . mineral in character may be selected by a State [if] . . . the selection is being made for mineral lands lost to the State because of appropriation before title could pass to the State; . . . ." No reference whatsoever is made to the *value* of the "minerals in character." This becomes the more significant, we believe, when we consider that the legislative history to P.L. 89-470, 89th Congress, 2nd Session, reflects, as do other reports, that the Department of the Interior withdrew its proposed amendment which would have included an equal value concept with respect to lands valuable for leaseable minerals in the place of the existing "acre for acre" selection basis. U.S. Code, Cong. & Ad. News, 2nd Session, Volume II, p. 2324 (1966).

The Utah Enabling Act provides that all lands granted for educational purposes (except as otherwise provided therein) shall constitute a permanent school fund. Section 10, 28 Stat. 107, Act of July 16, 1894. The federal grant in trust to Utah for the support of its public school system was accepted by

Utah subject to constitutional guaranties that the proceeds of sales of all lands granted for the support of the common schools shall ~~be~~ and remain a permanent fund, the interest of which only shall be expended for the support of the common schools, and any loss or diversion of all public school funds shall be restored. §§ 3 and 7, Article X, Constitution of Utah.

To reiterate, commencing September 10, 1965 through November 19, 1971, Utah filed 194 lieu land selection lists with the Bureau of Land Management, Department of the Interior, covering 157,255.90 acres of land in Uintah County, Utah, to serve as indemnification for school lands in place, mineral in character, which were denied Utah because of federal reservation and preemption or private entry prior to survey. The selection process involved Utah's determination of the "mineral in character" of the lands it had lost and the "mineral in character" of the "in lieu" lands it had selected. We are told and assume that this process required much study and expertise. It is undisputed that Utah's 194 selections were in compliance with the statutory criteria set forth in 43 U.S.C.A. § 852, *supra*. Even so, the Secretary has taken no action with respect to any of them, notwithstanding that many have been pending for a period in excess of ten years.

While the aforesaid 194 selection lists were pending, an agreement was entered into between Utah and the Secretary concerning two prototype oil shale leases issued by the Secretary embracing some 10,240

acres within the lands selected by Utah. In the course of this litigation, the District Court ordered that all bonus funds and rental proceeds derived from the two leases during the pendency of this action be paid into the registry of the court to be invested as directed by the court; as of May 25, 1976, some $48,291,840.00 had been paid into the district court registry and duly invested.

The District Court summarized Utah's position to be: that the Congress had expressly granted and appropriated lands to Utah to be selected as indemnification for original school lands that Utah did not receive because of federal pre-emption or private entry prior to survey; that the right of selection is in the discretion of Utah and not the Secretary of the Interior; that upon filing school indemnity selection lists in accordance with 43 U.S.C.A. § 852, equitable title to the selected lands vested in Utah; that the Secretary has a narrow range of discretion in reviewing and acting on such selection lists, limited to a ministerial adjudication to determine only whether such lists are in compliance with the criteria of § 852, *supra*; and, if so, the Secretary is obligated to approve said selections and to issue a clear list to the lands selected, thus vesting legal title in Utah. [R., Vol. III, pp. 103, 104.]

The District Court summarized the Secretary's position to be: that he is authorized and obligated by Section 7 of the Taylor Grazing Act, 43 U.S.C. § 315(f), to classify lands located within grazing districts to determine whether such disposition is ap-

propriate under applicable public-land laws; that in making such classification, the Secretary is authorized in his discretion to utilize public interest criteria, including a comparison of the value of the base school lands lost with that of the lands selected as indemnification; and, further, that classification in favor of disposition for school indemnity selection is a condition precedent to the vesting of any right, title or interest in any state which makes any such school indemnity selection.

Some of the pleadings relied upon by the trial court in granting summary judgment in favor of Utah which we deem significant are:

(1) Appendix B attached to Utah's motion for summary judgment, which is a copy of a Memo dated September 14, 1962, from the Associate Solicitor, Division of Public Lands, to the Director, Bureau of Land Management, stating, *inter alia*: "In considering an application by a state for indemnity selection under 43 U.S.C. 851, 852, the disparity in values between the lands offered as base and the lands selected cannot be considered . . . . When the state lieu selection statutes were last amended in 1958, it was clear Congress recognized the practice by the states of offering as base for indemnity selection lands of little value for lands of greater value because of the equal acreage (rather than equal value) provisions of that law . . . ." [R., Vol. III, p. 42.]

(2) Appendix P attached to Utah's motion for summary judgment, which is a copy of a letter dated February 14, 1974, from then Secretary of the In-

terior Roger Morton, to then Governor Calvin L. Rampton of Utah, stating, in part: "As you know, the [Department] has not as yet acted upon the [Utah] applications. The principal question presented . . . is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. 315f (1972), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect. In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, . . ." [R., Vol. III, p. 70.]

(3) Appendix Q attached to Utah's motion for summary judgment constituting a letter dated February 15, 1974, from Kent Frizzell, Solicitor, Department of the Interior, to Utah Attorney General Vernon B. Romney wherein Mr. Frizzell stated, in part: "We believe that the 'comparative value' criterion is a valid one with respect to classifying lands for State lieu selection; such classification being authorized by Section 7 of the Taylor Grazing Act, 48 Stat. 1272, 43 U.S.C. § 315f (1972). Accordingly, we intend to apply that criterion when we adjudicate the pending State applications." [R., Vol. III, p. 72.]

(4) Affidavit of Donald G. Prince, Assistant Director of State Lands, State of Utah, with attached copy of Memorandum of February 11, 1943, from the Commissioner of the General Land Office, Department of the Interior to the Secretary which notes, *inter alia*: "Following the 1936 amendment to the Taylor Grazing Act (Section 7 relied upon by Secretary in this action), and the promulgation of Circular 1398 which provides that the States 'should state whether the proposed exchanges are to be based upon equal values or equal areas' that all exchanges for the subsequent five year period were, on the States' election, made on the basis of equal area; *that state indemnity school land selections have always been based on equal areas, regardless of the value of the lease or selected lands, citing to California v. Deseret Water Etc. Company, 243 U.S. 415 and Wyoming v. United States, 255 U.S. 489.*" (Emphasis supplied.) [R., Vol. III, pp. 91-94.]

The Secretary vigorously challenges those findings of the District Court limiting the Secretary's authority to classify lands. They include:

> *Finding No. 11*: The Taylor Grazing Act was enacted as Public Law No. 482, 73rd Congress, Second Session, identified as the Act of June 28, 1934, 48 Stat. 1269, entitled:
>
> > An act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.

The pertinent part of Section 7 of the 1934 Act provided, with respect to the classification authority of the Secretary of Interior, that:

> . . . the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area.

There is no language in the 1934 Act which purports to give the Secretary of Interior authority to classify lands that are selected by States for indemnification of lost school lands, nor is there anything in the legislative history of the 1934 Act that suggests that Congress intended to require classification as a condition to school indemnity selections.

Further, the trial court found that the Secretary had no authority to compare value of lost lands with value of indemnity lands:

> *Finding No. 12*: The Taylor Grazing Act was amended in 1936 by Public Law No. 827, Act of June 26, 1936, 49 Stat. 1976 *et seq.* Section 7 of the 1936 Amendment, now codified as 43 U.S.C. 315(f), describes the Secretary's classification authority in the following language:
>
> > . . . the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands . . . within a grazing district, which are more valuable or suitable

> for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . .

The lands selected by Utah, as identified in Finding No. 4, above, are located within grazing districts. But there is nothing in the legislative history of the 1936 Amendment to Section 7 of the Taylor Grazing Act to suggest that classification by the Secretary is a prerequisite to the exercise of school indemnity selection rights by the States. If, however, such classification should be deemed to be a prerequisite to school indemnity selection, there are no statutory criteria for classification of school indemnity selections beyond a required determination as to whether the selected lands are proper for acquisition in satisfaction of indemnity selection rights. In particular, there is nothing in Section 7 or the underlying legislative history to suggest that the Secretary is authorized or empowered to utilize public interest criteria, or to compare the value

of lost base lands with the value of indemnity selections, as part of any classification procedure.

[R., Vol. III, pp. 104-106.]

Significant "Conclusions of Law" on the disputed central issue include:

Conclusion No. 3: Federal land grants in aid of the common schools of the State of Utah create a solemn and permanent public trust for the use, benefit and support of the public school system in Utah. This public trust was created by the United States, as settlor, granting to the State of Utah, as trustee, sections 2, 16, 32 and 36 within each township within the State of Utah for the permanent benefit of the Utah public school system, as beneficiary of the trust. The instruments which created this trust consisted of the Utah Enabling Act, 28 Stat. 107, as passed by the Congress of the United States, and the Constitution of the State of Utah, which accepted the terms of the trust, as ratified and adopted by the people of the State of Utah.

Conclusion No. 4: When original school land grants in place are denied to the State of Utah as a result of federal pre-exemption or private entry prior to survey, the State is entitled to select lands of equal acreage from otherwise unappropriated federal lands within the State, in lieu of and as indemnification for such lost base lands, pursuant to and in accordance with the criteria and limitations set forth in Section 852, Title 43, United States Code. This selection is to be made by the State in accordance with the congressional offer contained in said Section 852;

and, when such selections are duly filed, it is the duty of the Secretary of Interior to make a ministerial adjudication of such selection lists to determine whether they are in accordance with the requirements of said Section 852. If so, the Secretary must honor the state's acceptance of the congressional offer, and thus fulfill the purpose of the public school land trust, by approving said selections; but, if such selections are found not to be in compliance with the congressional criteria contained in said Section 852, the Secretary must deny and reject such selection lists.

Conclusion No. 5: If the ministerial adjudication of the school indemnity selection lists, as conducted by the Secretary under said Section 852, reveals that said selection lists were in fact in compliance with said Section 852, then Utah would have acquired equitable title to the lands so selected as of the dates the respective selection lists were filed, and from and after that date Utah would have been entitled to all revenues, rentals, emoluments and benefits arising or accruing from said lands from and after the respective dates when such selection lists were filed.

Conclusion No. 6: The language of Section 7 of the Taylor Grazing Act, as amended in 1936 (codified as 43 U.S.C. 315(f), cannot reasonably be construed to require classification of lands within grazing districts as proper for disposition in satisfaction of school indemnity selection lists filed under Section 852 of Title 43, U.S.C.; and there is nothing in the legislative history of the Taylor Grazing Act which indicates or suggests

that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the Taylor Grazing Act.

Conclusion No. 7: Even if it should be assumed that Section 7 of the Taylor Grazing Act could be construed so as to require classification prior to disposition of land within a grazing district in satisfaction of school indemnity rights, such a classification would not be a condition precedent to the vesting of equitable title in the State of Utah as of the respective dates that the selection lists were filed; and, further, the criteria which would govern the Secretary in making such classification would be exactly the same as those which he is obligated to utilize in making his ministerial adjudication under Section 852 of Title 43, U.S.C. This result necessarily follows from the fact that Section 7 (43 U.S.C. 315(f)) requires the Secretary, in making any such classification for lieu selections, to determine whether the selected lands are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . ." The Secretary is accorded no other or greater range of discretion, and no other criteria are provided by the statute. The Secretary's determination as to whether selected lands are "proper for acquisition" by the State in satisfaction of its indemnity rights would have to be measured by the requirements for such acquisition as set forth in the "applicable public-land law." The applicable public-land law for school indemnity selections is 43 U.S.C. 852, and any classification of lands made

by the Secretary under Section 7 for disposition in satisfaction of school indemnity selections would, of necessity, be the same in nature, substance and range of discretion as the ministerial adjudication performed under Section 852. It is for this reason that the result would be exactly the same whether the Secretary merely conducts the ministerial adjudication of school indemnity lists required under Section 852, or whether he conducts both the adjudication under Section 852 and the hypothetical classification under Section 7 (43 U.S.C. 315(f)). Since the law does not require the Secretary to do a useless act, and since there would be no point, purpose or benefit in a separate "classification" under Section 7, the Secretary is not required to "classify" the school indemnity selection lands in this action, but should proceed merely to conduct the ministerial adjudication required by 43 U.S.C. 852. Nothing in this Conclusion of Law No. 7 shall be construed as an indication that school indemnity selections are within the scope of the Taylor Grazing Act; and it is expressly concluded that school indemnity selections are not within the scope of, or subject to, that Act.

Conclusion No. 8: Any and all regulations promulgated by the Secretary of the Interior inconsistent with these Conclusions of Law, and, in particular, any provisions within Part 2620 or Part 2400, 43 C.F.R., that purport to require classification under the Taylor Grazing Act of school indemnity selections filed under 43 U.S.C. 852, are without authority of law, are contrary to law, and are void and of no force or effect.

Conclusion No. 9: In view of the narrow, confined, ministerial range of discretion con-

ferred on the Secretary under Section 852 of Title 43, U.S.C., and by Section 315f of Title 43, U.S.C. (if, indeed, the latter section could be construed to apply at all), the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, does not apply to secretarial review and action on school indemnity selection lists. The Secretary must approve those selections if they are in accordance with the congressional grant, appropriation and offer contained in the Utah Enabling Act, 28 Stat. 107, and Sections 851 and 852 of Title 43, U.S.C.

Conclusion No. 10: While federal land grants ordinarily are to be narrowly construed in favor of the United States and against the grantee, the reverse rule holds true with respect to school land grants and indemnity selections, the courts will adopt a liberal interpretation of the applicable statutes in order to honor and fulfill the public trust in aid and support of the common schools, and thus achieve the purpose intended by Congress in granting school trust lands.

Conclusion No. 11: The Secretary's failure to take any final action any of Utah's school indemnity selection lists which are the subject of this litigation, even though many of such selections have been pending before the Secretary for more than ten years, is "agency action unlawfully withheld or unreasonably delayed" within the meaning of Section 706(1), Title 28, U.S.C.

[R., Vol. III, pp. 107-111.]

On appeal, the Secretary contends that the District Court erred in: (1) finding and concluding that the Secretary does not have administrative discretion to classify school indemnity lieu lands based upon comparative market values between selected and base lands by virtue of the 1936 amendment to Section 7 of the Taylor Grazing Act, now codified as 43 U.S.C. § 315(f), and (2) assuming jurisdiction under the Tucker Act, 28 U.S.C. 1346(a)(2), to impound the oil-shale leasing receipts for the two tracts on the selection lists leased per agreement of the parties, in that the Mineral Leasing Act, 30 U.S.C. § 191 dictates and controls the manner of distribution contrary to the order of the court.

I.

We first consider the Secretary's challenge to the district court's finding and conclusion that the Secretary does not have administrative discretion to classify school indemnity lieu lands based upon comparative market values between selected and base lands by virtue of the 1936 amendment to the Taylor Grazing Act, now codified as 43 U.S.C. § 315(f).

The historical background we have heretofore referred to makes it clear that the school land grant statutes were enacted for a specific purpose. The strict "trust" conditions apply exclusively to the school lands granted the states or those selected "in lieu." No identical trust consequences or compact relationships exist with respect to other "lieu land" selections. *See, e.g.*, Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U.S. 301 (1903), involving lands owned in fee simple covered by a patent located in a national forest reservation; Wisconsin Central R.R. Co. v. Price County, 133 U.S. 496 (1890), involving selec-

tion of indemnity lands by a railroad land-grant company; and Hall v. Hickel, 305 F. Supp. 723 (D.C. Nev. 1969), rev. and remanded on other grounds, 473 F.2d 790 (9th Cir. 1973), *cert. denied*, 414 U.S. 828 (1973), involving "Valentine Scrip" lands. For other "lieu" selection statutes, *see*, 25 U.S.C.A. § 334 (selection rights of Indians residing off of an Indian Reservation) and 43 U.S.C.A. § 274 (selection rights to be exercised by veterans). The distinction was referred to in the case of Wilcoxson v. United States, 313 F.2d 884 (D.C. Cir. 1963). The court was involved in a construction of the Isloated Tracts Act. The court held that § 7, *supra*, authorized the Secretary to employ his discretion relative to disposal of the subject lands. The court recognized that such discretion does not apply to the state in-lieu grants for the benefit of the public schools. Other decisions have recognized the classification powers under § 7, *supra*, under specific statutes.

The Section 7 amendment relied upon by the Secretary for authority to "classify" in the instant case does not specifically refer to "in lieu" selections as indemnity for school land grants; rather, reference is there made to the Secretary's authorization to classify lands within a grazing district to determine if those lands are proper for acquisition in satisfaction of "any outstanding lieu . . . rights or *land grants* . . . ." Thus, we are asked by the Secretary to substitute the general language above cited for the unambiguous, clear and unqualified language in 43 U.S.C. § 851, *supra*, which speaks directly to the subject of lieu selections as indemnity for school land

grants lost to the states by use of the specific, unabridged language directing that the states may select ". . . *other lands of equal acreage* . . . in accordance with the provisions of section 852 of this Title, by said State to compensate deficiencies for school purposes . . . ." The distinction between the legal rights attendant upon private "in lieu" exchanges of lands and state "in lieu" exchanges as indemnity for lost school land grants was specially recognized in Lewis v. Hickel, 427 F.2d 673 (9th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971). There, the private exchange provisions of the Taylor Grazing Act were at issue. In their efforts to overturn the decision of the Secretary rejecting their application for a private exchange of lands under the Taylor Grazing Act, the appellants placed "strong reliance" upon Payne v. New Mexico, 255 U.S. 367 (1921). The Court stated in this regard:

> Appellants place strong reliance upon Payne v. New Mexico . . ., a case involving the Secretary's denial of an exchange under an Act granting New Mexico the *right* to select certain lands for the support of the common schools. However, that case and others like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with. *Hence, the power conferred upon the Secretary was merely 'judicial in its nature' (255 U.S., at 371, 41 S.Ct. 333) in the sense that his only function was to ascertain whether the specific conditions had been met.*
>
> *Under the exchange provisions of the Taylor Grazing Act, the power conferred on the Sec-*

retary is much broader than that of determining if the applicant has met the conditions prescribed by Congress. (Emphasis supplied.)

427 F.2d, at p. 676.

We agree with the finding of the trial court and the rationale in Lewis v. Hickel, *supra*, i.e., that nothing in the language of the Taylor Grazing Act, as amended, or its legislative history, empowers the Secretary to invoke the Section 7 (43 U.S.C. § 315 (f)) "classification" criteria to "in lieu" selections by a state of lands within a grazing district pursuant to the school indemnity selection statutes. We deem it significant that the Secretary has failed to point out that the § 7 classification authority, in any event, relates *only* to surface entry rights. The Act specifically provides that the lands withdrawn for classification remain open to mineral location. 43 U.S.C.A. §§ 315f, 315g(d). The classification power does not extend to the mineral estate.

We reiterate that land grant legislation enacted by the Congress designed to aid the common schools of the states is to be construed liberally (in favor of the states) rather than restrictively. State of Wyoming v. United States, *supra*. In Beecher v. Wetherby, 95 U.S. 517 (1877), the Supreme Court held that when a state is admitted to the Union and is granted sections 16 in the state upon certain conditions to be ratified by the constitution of the state, and the ratification was made, then the condition became unalterable and obligatory on the United States. This rule is explicit. *See also*: 81A C.J.S., States, § 4b. This court cannot engraft an exception thereon favoring the Secretary's administrative discretion claimed here. We thus hold that the district court did not err in its findings and conclusions that the exchange of school lands lost for "in lieu" lands to be selected by Utah is to be undertaken on the equal acreage basis once it is determined that the respective lands are "mineral in character" without regard to valuation. The value-for-value exchange criteria set forth in Section 7, *supra*, does not apply. The legislative history relating to 43 U.S.C. §§ 851 and 852, *supra*, together with that of the 1936 amendment to Section 7 of the Taylor Grazing Act show complete silence on the part of the Congress of any intent to authorize broadening of the Secretary's classification authority respecting the indemnity selection rights of Utah. However, when we review the provisions of 43 U.S.C. §§ 851 and 852, *supra*, it is strikingly clear that Congress did grant the states broad rights in effecting indemnity selections. There is no question that the "equal acreage" language originally set forth in § 851, *supra*, has been retained throughout its amendatory history. At no time has the Congress used the "equal value" reference.

The trust aspect of the obligation imposed upon and assumed by the respective "public land" states in relation to lands granted for the benefit of the public school system was recently recognized by the United States Supreme Court in Lassen v. Arizona, ex rel Arizona Highway Dept., 385 U.S. 458 (1967). There, the Arizona Supreme Court was reversed in its holding that the Arizona Highway Department could

condemn trust lands acquired by Arizona under § 28 of its Enabling Act for highway construction on the ground that it could be presumed that highways constructed across such trust lands always enhanced the value of the areas taken and that, accordingly, the Highway Department was not required to compensate the trust. The United States Supreme Court emphasized that § 28 of the Enabling Act required that trust lands be sold or leased only to "the highest and best bidder"; that no lands be sold for less than their appraised value; that disposal of trust lands be "only in manner as herein provided"; and that disposition in any other way shall be a breach of trust. The Court held that only sales and leases were intended and that the grant was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the state could support the public institutions designated by the Act. The *Lassen* court reaffirmed the rule applied in Ervien v. United States, 251 U.S. 41 (1919) recognizing strict concern for the integrity of the trust conditions imposed by the various "public land" state enabling acts. In *Ervien, supra*, the Court held that actual compensation "in money" must be paid the trust equaling the appraised value. The same stringent trust conditions were again reaffirmed by the holding that a lease by Arizona of lands acquired for the common schools under its Enabling Act can only be executed in consideration of a rental representing its "true value." Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295 (1976).

The trial court specifically found that there is nothing in the legislative history of the 1936 amendment to Section 7 of the Taylor Grazing Act to suggest that the classification by the Secretary is a prerequisite to the exercise of Utah's school indemnity selection rights. [R., Vol. III, p. 105.] We agree.

There are established rules of statutory construction supporting the trial court's conclusion that Section 7 does not control here: A statute must be construed as it was intended to be understood when enacted in the light of the conditions as they existed when the act was passed. United States v. Stewart, 311 U.S. 60 (1940). Words of a statute are to be interpreted in their ordinary definitions and the meanings commonly attributed to them. Jones v. Liberty Glass Company, 332 U.S. 524 (1978). Where there are two statutes upon the same subject, the earlier being special (as is the case with regard to 43 U.S.C. §§ 851 and 852, *supra*) and the later being general (as is the case with regard to the 1936 amendment to the Taylor Grazing Act, 43 U.S.C. § 315(f), *supra*) it is settled law that the special act remains in effect as an exception to the general act unless absolute incompatibility exists between the two, and all matters coming within the scope of the special statute are governed by its provisions. Preiser v. Rodriguez, 411 U.S. 475 (1973); Missouri K & T Ry. Co. v. Jackson, 174 F.2d 297 (10th Cir. 1949); United States v. Fixico, 115 F.2d 389 (10th Cir. 1940); Sutherland Statutory Construction, 4th Ed., Vol. 2A § 51.05. The latter authority summarized the general-special acts rule:

> General and special acts may be in pari materia. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible, but if there is conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.
> Sutherland Statutory Construction, 4th Ed., Vol. 2A, § 51.05, p. 315.

We submit that the strict, continuing "trust" obligations imposed by the Congress upon the "public land" states (and willingly accepted by them) in the school land grant statutes clearly set these enactments aside as *special acts* completely separate and apart from all other public land grant enactments. In that sense, then, these enactments are set apart and given special, independent treatment, much akin to the special preference and treatment of Indians recognized in Morton v. Mancari, 417 U.S. 535 (1974).

This court has held that a statutory exception should be strictly construed so that the exception does not devour the general policy which the law embodies. Edward B. Marks Music Corp. v. Colorado Mag., Inc., 497 F.2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). Statutes are, in all instances, to be construed in a manner so as to effectuate the intent of the enacting body, and an unambiguous statute must be given its plain and

obvious meaning. United States v. Ray, 488 F.2d 15 (10th Cir. 1973); United States v. Western Pacific Railroad Company, 385 F.2d 161 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968). The case of Bronken v. Morton, 473 F.2d 790 (9th Cir. 1973) is in point. It involved the issue of the Secretary's power to apply the "comparative value" test of § 7, *supra*, upon denial by the Secretary of the issuance of land patents to holders of "in lieu" selection rights involving "Valentine scrip certificates" issued to compensate lands lost by reason of the Mexican land grant. The "scrip" statute authorized the holder to select an "equal quantity" of certain public lands. The Secretary opted for selection based on "equal value." The court rejected the Secretary's position because the "Valentine" scrip act did not provide "that monetary value of the selected lands" was the criteria.

Applying these rules of statutory construction, we hold that the District Court did not err. Furthermore, we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah. A detailed recital of these two opinions follows.

Payne v. New Mexico, *supra*, involved a suit by New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Section of the Land Office from canceling or annulling a "lieu land selection of that state under a mistaken conception of their power and duty." New Mexico did all that was needed to perfect the selection (just as here).

The list was approved by the local land office and sent to the general land office. The list was accepted and approved. One year later the Commissioner directed that the selection be canceled "solely on the ground that in the meantime . . . the base tract . . . had been eliminated from the reservation by a change in its boundaries." The Secretary affirmed the Commissioner. The state appealed. Both offices proceeded on the basis that the validity of the selection was to be tested by conditions existing when they came to examine it and not by those existing when the state made the selection. The Supreme Court held that the conditions existing when the selection was made control. In so holding the Court said that the provision under which the selection was made (the "lost" lands and the "in lieu" lands were non-mineral in character) was one inviting and proposing an exchange of lands whereby the Congress said, in substance, to the state:

> If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land offices cannot lawfully cancel or disregard. In this respect the provision under which the state proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.
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> 255 U.S., at p. 370.

Again, in relation to the language "under the direction and subject to the approval of the Secretary of Interior" appearing in the statutes relating to lieu land selection, the Court in *Payne, supra,* noted its prior decision that a claimant to public land who has done all that is required under the law to perfect his claim acquires equitable title to the land which the Government then holds in trust for him. The Court said:

> The words relied upon (subject to the approval of the Secretary of the Interior) are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect to both the land relinquished and the land selected, and of approving or rejecting the selection accordingly.
>
> 255 U.S., at p. 371.

State of Wyoming v. United States, *supra,* involved a suit by the United States to establish title to 80 acres of land and to the proceeds of oil produced therefrom. One of the defendants, the State of Wyoming, claimed under a lieu selection made in 1912. It was against that selection and lease that the United States sought to establish title. Under the Act of July 10, 1890, Congress granted to Wyoming for the support of its common schools Sections 16 and 36 in each township as lands in place, with certain exceptions. The act of February 28, 1891, granted the state, in the event any of the designated lands in place should be included within a public reservation, the privilege to *"waive its right thereto*

and select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the state. See: California v. Deseret Water, Etc., Co., 243 U.S. 415 (1917); Payne v. New Mexico, *ante*, 367. Other laws of general application, §§ 441, 453, 2478, Rev. Stats., require that the selections be made under the direction of the Secretary of the Interior." (Emphasis supplied.) 255 U.S., at 494.

The State of Wyoming selected the 80 acres in lieu of a tract which had passed to the State under the school grant which was included in a public reservation known as the Big Horn National Forest. The selected in lieu acreage "was vacant, unappropriated, and neither known nor believed to be mineral . . . . 'The State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the Government, and everything that was required either by statute or regulation of the Land Department . . . ." 255 U.S. at 494. The list remained in the General Land Office awaiting the consideration of the Commissioner for about three years. In the meantime, the selected land, and other lands, were included in a temporary exclusive withdrawal as possible oil land and thereafter the Commissioner declined to accept the selection made by the State of Wyoming and called on the State to either accept a limited surface right-certification or to show that the 80 acres was *still* not known or believed to be mineral. Wyoming claimed that it had been vested with equitable title

when the selection was made. Accordingly, Wyoming refused the tender. The Commissioner then canceled the selection on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and oil discoveries in the vicinity. The Secretary of Interior affirmed the Commissioner. In the meantime, Wyoming had issued an oil lease on the selected tract. The oil company (lessee) drilled and obtained successful production of oil some four years after the selection. The Supreme Court posed the issue presented as:

> The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, *and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, or* still later *was discovered to be mineral land,* that is, to be *valuable for oil.* (Emphasis supplied.)
>
> 255 U.S., at p. 496.

The Court held that once Wyoming had complied with lawful "in lieu" selection procedures, there was no power conferred in the Commissioner or the Secretary to withhold the approval in the sense of granting or denying a *privilege to the state,* but rather:

> *. . . of determining whether an existing privilege conferred by Congress had been lawfully exercised;—in other words, their action was to be judicial in its nature and directed to an ascer-*

tainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then—if they met all the requirements of the *congressional proposal*, including the directions given by the Secretary—they remained valid *notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.* (Emphasis supplied.)

255 U.S., at pp. 496, 497.

The Court equated the "in lieu" selection to a cash entry, citing to Benson Mining Co. v. Alta Mining Co., 945 U.S. 428 (1892), for the proposition that when the price is paid the right to the patent immediately arises and the delay in the Land Department relative to administrative processing does not diminish the rights flowing from the purchase. Further, the Court made special reference to its decision in Daniels v. Wagner, 237 U.S. 547 (1915). There the Secretary rejected a lieu selection and ruled that no right attached under the selection unless and until it was approved by him and that he possessed a discretion to reject it and give effect to an intervening change in conditions. The Court did not accept the Secretary's position. The Court held that when selections were made in accord with statutes it was the

plain duty of the Secretary to approve them and *that the Secretary's power to approve the lists of selection was judicial in its nature.* 255 U.S., at pp. 502, 503. The most telling, significant and pertinent language of the Supreme Court opinion in State of Wyoming v. United States, *supra*, directly applicable to the contention raised by the Secretary here that the "value for value" criteria is to be employed in approving the "in lieu" selection at issue is:

> . . . If these (selections of "in lieu" lands) were valid then (when the selection lists were submitted) . . . they remained valid notwithstanding the subsequent change in conditions (i.e., discovery of oil and production thereof). Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.
>
> 255 U.S., at p. 497.

We believe that until and unless there is commercial production of minerals there is really no definitive means or method of ascertaining comparative *value* of tracts which are "mineral in character." The Supreme Court obliquely recognized this, *supra*, by reference to "whatever advantage or disadvantage may arise from a subsequent change in condition whether one tract or the other be affected."

Thus, we conclude that the solemn bilateral agreement between the United States and the "Land Grant" State of Utah included the unqualified, unambiguous *right* of Utah, upon incorporation in its Enabling Act of the waiver heretofore referred to, coupled with Utah's acceptance of the trust conditions and obligations set forth under Sections 3 and 7, Art. X of its Constitution, to select "in lieu" school indemnity lands which are "mineral in character" for the specific school lands granted which are "mineral in character" but lost to the State. There is no legislative criteria limiting or defining the term "mineral in character." Thus all that is required is that both the "lost" lands and the "in lieu" lands have some identifiable "mineral in character." The Secretary argues, it seems, that the affected "Land Grant" states are to be bound without exception to the stringent trust obligations they have assumed in their administration of the "school lands" granted—or those selected "in lieu"—while the United States Government is not bound to the performance of those covenants it agreed to in consideration for Utah's waiver. We reject this contention. It is unreasonable and contrary to the solemn covenant of the United States Government; it is also in derogation of the plain language employed by the Supreme Court in State of Wyoming v. United States, *supra.*

The trial court found yet another reason for rejecting the Secretary's position on the application of Section 7 in concluding that:

> . . . If, however, such classification (as set forth under Section 7, now codified as 43 U.S.C. § 315 (f), supra), should be deemed to be a prerequisite to school indemnity selection, there are no statutory criteria for classification beyond a required determination as to whether the selected lands are proper for acquisition in satisfaction of indemnity selection rights. In particular, there is nothing in Section 7 or the underlying legislative history to suggest that the Secretary is authorized or empowered to utilize public interest criteria, or to compare the value of lost base lands with the value of indemnity selections as part of any classification procedure.

We agree. In our view Section 7 was not directed to school indemnity selection rights because its thrust is to "uses." Section 7 authorizes the Secretary to employ a classification process to determine whether lands within a (Taylor Grazing) grazing district may be adaptable to "uses" having a higher value than grazing. The Secretary was empowered to:

> . . . to examine and classify any lands . . . within a grazing district, which are more valuable or suitable for the production of crops for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act . . . .
>
> 43 U.S.C.A. § 315(f).

School indemnity selections are not proposed "uses" of land. They are selections for the transfer of title and subsequent administration by the states under

the solemn trust conditions. Accordingly, the aforesaid "classification" procedures or Section 7 cannot apply to school indemnity selections. Under 43 U.S.C. § 851, *supra*, the Taylor Grazing lands *are appropriated* to the states for indemnity selections. The Secretary is confined to unappropriated lands under Section 1 of the Taylor Grazing Act. 43 U.S.C. § 315. School indemnity selections are not "entries" in the traditional sense. All federal lands in Utah are situate within grazing districts. Thus, we must conclude that if the Secretary's power to "classify" school indemnity lands applies, there are no legislative guidelines or criteria spelling out the scope of such power. The Secretary argues that he has authority under Section 7 to cancel the "in lieu" selections based upon his discretionary power to "classify," but he has not deemed it necessary to spell out the scope or extent of the "classification" power in the case at bar. In fact, he contends that Section 7 "puts no restrictions on the substance of secretarial discretion." [Brief of Appellant, p. 31.] The Secretary's contention is erroneous. The "classification" criteria were spelled out by the Congress for other types of public land dispositions under the 1936 amendment, i.e., homestead entries and exchange of private land. We agree with Utah that, "It makes no sense to suppose that Congress would spell out conditions and criteria for the exchange of private land for federal land, but would at the same time grant to the Secretary unlimited discretion, with no criteria or guidance, to deny school indemnity selections by classifying the

land for retention in federal ownership." [Brief of Appellee, p. 60.] The breadth and scope of the right of "classification" claimed by the Secretary creates the very vagueness condemned in Connally v. General Construction Co., 269 U.S. 385 (1926). There the Court held that a statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. *See also*: Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); Sutherland Statutory Construction, 4th Ed., Vol. 1A, § 21.16.

Finally, we reach the Secretary's contention that classification is likely required under Executive Order 5327 issued by President Hoover on April 15, 1930, and Executive Order 6910 issued by President Roosevelt on November 26, 1934. Both constituted withdrawals of all of the vacant, unreserved and unappropriated lands of the public domain subject to certain classification and examination. We have carefully reviewed these orders. We hold that nothing in these orders can be construed to apply to state school indemnity selections.

II.

The Secretary contends that the district court lacked jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a)(2), to impound the moneys realized representing oil-shale leasing receipts which Congress, in Section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191, had previously appropriated for distribution in a way contrary to the trial court's orders.

We disagree. We hold that the District Court did not err by reason of its impoundment and investment orders.

The Secretary, following Utah's indemnity selections, issued two federal mineral leases to third parties on some 5,000 acres out of the lands included in the 194 parcels Utah had selected. Millions of dollars of rentals had been paid to the Secretary by the lessees relating to the oil-shale leases.

Section 35 of the Mineral Leasing Act directs that the Secretary pay all oil-shale leasing receipts into the United States Treasury for later redistribution twice a year in varying percentages to Utah, the federal reclamation fund, and to miscellaneous depositories in the Treasury. Thus, the Secretary contends that nothing in the statutes permits the federal courts from impounding these funds to satisfy some anticipated future judgment not yet rendered. Judicial seizure, contends the Secretary, is a suit against the United States, in this case without its consent. This argument was not raised in the District Court and need not be entertained for the first time on appeal. However, the procedure employed by the District Court appears from the record to have been tacitly consented to by the United States which at no time objected to the orders of the court relative to impoundment or despit. [*See*, R., Vol. I, p. 69.] In addition, the record reflects that Utah and the Secretary recognized Utah's potential ownership of the leased tracts, together with the lease rentals received, in light of the request by the United States, acceded to by Utah,

that Utah consent to the lease transactions pending the outcome of this litigation initiated to resolve the ownership of the lands and the funds. [R., Vol. III, pp. 73, 74.] In our judgment, Wyoming v. United States, *supra*, firmly supports the trial court's action.

Utah has not pursued an action for damages. In addition, the Tucker Act cannot apply in view of the limit of $10,000.00 in any civil action or claim thereunder against the United States. 28 U.S.C.A. § 1346 (a)(2). We deem the action of the District Court entirely consistent with Fed. Rules Civ. Proc. rule 67, 28 U.S.C.A., relative to deposit of the funds with the court and the provisions of 28 U.S.C.A. §§ 2041 and 2042 relating to money deposited and withdrawn.

WE AFFIRM.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C-74-64

[Filed June 8, 1976]

THE STATE OF UTAH, by and through
its Division of State Lands, PLAINTIFF

v.

THOMAS S. KLEPPE, individually and as Secretary of
the United States Department of Interior, DEFENDANT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

The above-entitled matter came on regularly for hearing pursuant to a special setting on Wednesday, February 25, 1976, at 10:00 a.m., and for further oral argument on Tuesday, May 25, 1976, at 10:00 a.m., all in accordance with the Stipulation of the parties dated June 10, 1975, and the Pre-Trial Order of the Court signed and entered on the 16th day of June, 1975, and further in accordance with the respective motions for summary judgment filed by the parties on August 18, 1975; plaintiff was represented at both hearings by Richard L. Dewsnup and Clifford L. Ashton, Special Assistants to the Utah Attorney General, and by Dallin W. Jensen, Assistant Utah At-

torney General, and defendant was represented by Ramon M. Child, United States District Attorney, and by Gerald S. Fish, Attorney with the United States Department of Justice; and the matter having been fully briefed by the parties through primary and answering briefs filed September 15, 1975, and October 15, 1975, respectively, and by plaintiffs' supplemental brief filed March 12, 1976, and defendant's supplemental brief dated April 16, 1976; and the Court now having read and considered the briefs and memoranda on file, and having heard and considered the oral arguments by the parties, and now being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Finding No. 1: Plaintiff Division of State Lands of the State of Utah is an agency of state government having statutory responsibility, acting for and in behalf of the State of Utah, to manage and administer all lands received by the State of Utah under school land grants from the United States, and is authorized and empowered under state law to exercise Utah's rights to select federal lands in lieu of and as indemnification for original school land grants in place that were denied to the State of Utah as a result of federal reservation and pre-emption, or private entry, prior to survey; and defendant Thomas S. Kleppe is the duly appointed, confirmed and acting Secretary of the United States Department of the Interior.

Finding No. 2: Plaintiff invoked the jurisdiction of this Court under 28 U.S.C. 1331 (federal question) and 28 U.S.C. 1361 (mandamus); and seeks to compel the defendant to take administrative action that has been "unlawfully withheld or unreasonably delayed" under Section 706(1) of the Administrative Procedures Act, 5 U.S.C. 701 *et seq.*, and to obtain a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. 2201 *et seq.*, as to the nature and extent of plaintiff's school indemnity selection rights under selection lists heretofore filed with the Bureau of Land Management of the United States Department of Interior; and venue is laid under 28 U.S.C. 1391 (e)(3), since the lands subject to this litigation are located within Uintah County, State of Utah, and thus within the geographic jurisdiction of the Central Division of this Court.

Finding No. 3: The amount in controversy, exclusive of interest, attorneys' fees and costs, exceeds $10,000.00.

Finding No. 4: Between the dates of September 10, 1965, and November 19, 1971, plaintiff filed 194 selection lists with the Bureau of Land Management of the United States Department of Interior, covering 157,255.90 acres of land in Uintah County, State of Utah, as lieu lands to serve as indemnification for school land grants in place which were denied to Utah because of federal reservation and pre-emption, or private entry, prior to survey. These selection lists may be summarized as follows:

September 10, 1965	17,589.44 acres
February 8, 1966	1,760.00 acres
May 17, 1967	21,103.32 acres
October 20, 1967	3,232.35 acres
November 2, 1967	14,689.83 acres
December 19, 1969	25,583.20 acres
February 17, 1970	38,058.81 acres
November 8, 1971	11,044.87 acres
November 15, 1971	11,977,49 acres
November 19, 1971	12,216.59 acres
TOTAL	157,255.90 acres;

and said selection lists are more particularly identified and described below:

	Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
1.	3842	UO147222	09/10/65	12/24E	640.00
2.	3843	UO147223	"	"	640.00
3.	3844	UO147224	"	"	640.00
4.	3845	UO147225	"	"	640.00
5.	3846	UO147226	"	"	623.52
6.	3847	UO147227	"	"	624.48
7.	3848	UO147228	"	"	640.00
8.	3849	UO147229	"	"	640.00
9.	3850	UO147230	"	"	640.00
10.	3851	UO147231	"	"	640.00
11.	3852	UO147232	"	"	640.00
12.	3853	UO147233	"	"	640.00
13.	3854	UO147234	"	"	640.00
14.	3855	UO147235	"	"	640.00
15.	3856	UO147236	"	"	640.00
16.	3857	UO147237	"	"	640.00
17.	3858	UO147238	"	"	640.00
18.	3859	UO147239	"	"	640.00
19.	3860	UO147240	"	"	625.48
20.	3861	UO147241	"	"	626.56
21.	3862	UO147242	"	"	640.00
22.	3863	UO147243	"	13S/24E	700.40
23.	3864	UO147244	"	"	693.72
24.	3865	UO147245	"	"	690.40
25.	3866	UO147246	"	"	688.37

	Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
26.	3867	UO147247	"	"	680.75
27.	3868	UO147248	"	"	635.76
28.	3869	UO147249	"	"	120.00
29.	3892	UO148864	02/08/66	"	640.00
30.	3893	UO148865	"	"	640.00
31.	3894	UO148866	"	"	480.00
32.	4018	U3059	05/17/65	9-10S/25E	641.72
33.	4019	U3060	"	10S/25E	677.65
34.	4020	U3061	"	"	655.11
35.	4021	U3062	"	"	644.53
36.	4022	U3063	"	"	640.00
37.	4023	U3064	"	"	640.00
38.	4024	U3065	"	"	640.00
39.	4025	U3066	"	"	640.00
40.	4026	U3067	"	"	653.37
41.	4027	U9068	"	"	640.00
42.	4028	U3069	"	"	640.00
43.	4029	U3070	"	"	640.00
44.	4030	U3071	"	"	640.00
45.	4031	U3072	"	"	640.00
46.	4032	U3073	"	"	640.00
47.	4033	U3074	05/17/67	10S/25E	640.00
48.	4034	U3075	"	"	640.00
49.	4035	U3076	"	11S/25E	640.00
50.	4036	U3077	"	"	637.59
51.	4037	U3078	"	"	640.00
52.	4038	U3079	"	"	649.62
53.	4039	U3080	"	"	640.00
54.	4040	U3081	"	"	647.98
55.	4041	U3082	"	"	640.00
56.	4042	U3083	"	"	640.00
57.	4043	U3084	"	"	640.00
58.	4044	U3085	"	"	640.00
59.	4045	U3086	"	"	640.00
60.	4046	U3087	"	"	640.00
61.	4047	U3088	"	11-12S/25E	640.00
62.	4048	U3090	"	12S/25E	663.64
63.	4049	U3089	"	"	542.11
64.	4075	U4176	10/20/67	13S/25E	640.00
65.	4076	U4177	"	"	655.92
66.	4077	U4178	"	"	640.00
67.	4078	U4179	"	"	648.92
68.	4079	U4180	"	"	647.51
69.	4080	U4266	11/02/67	"	632.80
70.	4081	U4267	"	"	640.00
71.	4082	U4268	"	12S/25E	640.00

	Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
72.	4083	U4269	"	"	640.00
73.	4084	U4270	"	"	640.00
74.	4085	U4271	"	"	640.00
75.	4086	U4272	"	"	640.00
76.	4087	U4273	"	"	640.00
77.	4088	U4274	"	"	640.00
78.	4089	U4275	"	"	640.00
79.	4090	U4276	"	"	640.00
80.	4091	U4277	"	"	640.00
81.	4092	U4278	"	"	638.44
82.	4093	U4279	"	"	639.38
83.	4094	U4280	"	"	639.59
84.	4095	U4281	"	"	640.00
85.	4096	U4282	"	"	632.46
86.	4097	U4283	"	"	640.00
87.	4098	U4284	"	"	640.00
88.	4099	U4285	"	"	640.24
89.	4100	U4286	"	"	640.00
90.	4101	U4287	"	"	639.65
91.	4102	U4288	"	"	627.27
92.	4147-A	U10449	12/19/69	10S/22E	640.00
93.	4148	U10450	"	"	640.00
94.	4149	U10451	"	10S/22-23E	640.00
95.	4150	U10452	"	10S/23E	646.40
96.	4151	U10453	"	"	640.00
97.	4152	U10454	"	"	640.00
98.	4153	U10456	"	"	640.00
99.	4154	U10457	"	"	640.00
100.	4155	U10455	"	"	640.00
101.	4156	U10458	"	"	640.00
102.	4157	U10459	"	"	640.00
103.	4158	U10460	"	"	639.20
104.	4159	U10461	"	"	639.84
105.	4160	U10462	"	"	640.00
106.	4161	U10463	"	"	640.00
107.	4162	U10464	"	10S/23-24E	640.00
108.	4163	U10465	"	10S/24E	640.00
109.	4164	U10466	"	"	640.00
110.	4165	U10467	"	"	640.00
111.	4166	U10468	12/19/69	10S/24E	640.00
112.	4167	U10469	"	"	640.00
113.	4168	U10470	"	"	640.00
114.	4169	U10471	"	"	640.00
115.	4170	U10472	"	"	640.00
116.	4171	U10473	"	"	640.00

	Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
117.	4172	U10474	"	"	640.00
118.	4173	U10475	"	"	637.40
119.	4174	U10476	"	"	640.00
120.	4175	U10477	"	"	640.00
121.	4176	U10478	"	"	640.00
122.	4177	U10479	"	"	640.00
123.	4178	U10480	"	"	640.00
124.	4179	U10481	"	"	639.08
125.	4180	U10482	"	"	640.00
126.	4181	U10483	"	"	640.00
127.	4182	U10484	"	"	640.00
128.	4183	U10485	"	10S/24E & 11S/22E	640.00
129.	4184	U10486	"	11S/22E	621.28
130.	4185	U10487	"	"	640.00
131.	4186	U10488	"	"	640.00
132.	4187	U10895	02/17/70	"	640.00
133.	4188	U10894	"	"	640.00
134.	4189	U10896	"	11S/22-23E	645.79
135.	4190	U10897	"	11S/23E	623.21
136.	4191	U10873	"	"	640.00
137.	4192-A	U10874	"	11S/24E	639.84
138.	4195	U10875	"	"	639.48
139.	4198	U10877	"	"	639.31
140.	4199	U10878	"	11S/23E	613.44
141.	4200	U10879	"	"	640.00
142.	4201	U10884	"	"	630.77
143.	4202	U10885	"	"	631.73
144.	4203	U10886	"	"	640.00
145.	4204	U10887	"	"	640.00
146.	4205	U10888	"	"	640.00
147.	4206	U10889	"	"	640.00
148.	4207	U10890	"	"	627.88
149.	4208	U10891	"	"	640.00
150.	4209	U10892	"	"	640.00
151.	4210	U10893	"	"	640.00
152.	4211	U10898	"	"	525.02
153.	4212	U10899	"	"	605.00
154.	4213	U10900	"	"	640.00
155.	4214	U10901	"	"	640.00
156.	4215	U10902	"	"	640.00
157.	4216	U10903	"	"	640.00
158.	4217	U10904	"	"	602.09
159.	4218	U10905	"	"	640.00
160.	4219	U10906	"	"	640.00

	Utah Serial No.	U.S. Serial No.	Date Filed	Township & Range S.L.B. & M.	Acres
161.	4220	U10907	"	"	640.00
162.	4221	U10908	"	"	640.00
163.	4222	U10909	"	"	640.00
164.	4223	U10910	"	"	640.00
165.	4224	U10911	"	"	605.68
166.	4225	U10912	"	"	606.92
167.	4226	U10913	"	"	640.00
168.	4227	U10880	"	"	640.00
169.	4228	U10881	"	"	640.00
170.	4229	U10882	"	11S/24E	641.76
171.	4230	U10883	"	"	642.22
172.	4231	U10914	"	"	643.58
173.	4232	U10915	"	"	636.81
174.	4233	U10916	"	"	640.00
175.	4234	U10917	02/17/70	11S/24E	640.00
176.	4235	U10918	"	"	640.00
177.	4236	U10919	"	"	640.00
178.	4237	U10920	"	"	632.92
179.	4238	U10921	"	"	649.11
180.	4239	U10922	"	"	634.85
181.	4240	U10923	"	"	644.79
182.	4241	U10924	"	"	640.00
183.	4242	U10925	"	"	640.00
184.	4243	U10926	"	"	640.00
185.	4244	U10927	"	"	641.67
186.	4245	U10928	"	"	634.22
187.	4246	U10919	"	"	640.00
188.	4247	U10930	"	"	640.00
189.	4248	U10931	"	"	640.00
190.	4249	U10932	"	"	640.00
191.	4250	U10933	"	"	620.52
192.	4256	U16905	11/08/71	11S/24E & 12S/22-23E	11,044.87
193.	4257	U16942	11/15/71	12S/23-24-25E	11,977.49
194.	4258	U16956	11/19/71	10S/25E, 11S/24-25E, 12S/24-25E & 13S/23E	12,216.59

Finding No. 5: Pursuant to an Agreement entered into between the State of Utah and the Secretary of Interior, the United States issued two proto-type oil

shale leases, pursuant to public bidding, embracing 10,240 acres within the lands selected by the State of Utah as above-described in Finding No. 4. Said Agreement was made and dated the 22nd day of February, 1974, before the present action was filed, but the actual leases were awarded and executed after this action was filed. The first lease is identified as Tract U-a, and aggregates 5,120 acres located in T. 10 S., R. 24 E., S.L.B. & M.; and the second lease is identified as Tract U-b, and aggregates 5,120 acres located partly in T. 10 S., R. 24 E., S.L.B. & M., and partly in T. 10 S., R. 25 E., S.L.B. & M. Pursuant to an Order to Show Cause duly requested by plaintiff State of Utah and issued by the Court, and after a hearing thereon, the Court ordered that all bonus funds and rental proceeds derived from those leases during the pendency of this action be paid into Court through the registry of the Court, and invested pursuant to appropriate procedures and safeguards, as set forth in the Orders issued by the Court governing such investments, until such time as the rightful owner of the lands and proceeds is ultimately and finally determined. As of May 25, 1976, the total principal sum of $48,291,840.00 had been paid into Court and invested pursuant to such Orders, and an independent audit by the certified public accounting firm of Coopers & Lybrand submitted to the Court under date of September 8, 1975, reported that said funds were being duly invested pursuant to appropriate procedures and safeguards.

Finding No. 5: The defendant has taken no final, official action with respect to any of the selection lists

identified in Finding No. 4, above, despite the fact many of those selections have been pending for more than ten years; nor has the defendant offered any satisfactory explanation as to why he has failed to take action on such selection lists.

Finding No. 6: The selection lists filed by plaintiff, as identified in Finding No. 4, above, were for the purpose of exercising part of Utah's indemnity selection rights arising from the Utah Enabling Act, 28 Stat. 107, Act of July 16, 1894, and Sections 851 and 852, Title 43, United States Code. Section 6 of the Utah Enabling Act granted to Utah sections 2, 16, 32 and 36 within each township in Utah as a land grant for the support of Utah's public schools, and expressly provided that where:

> . . . such sections, or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress, other lands equivalent thereto . . . are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior . . . . (*Section 6, 28 Stat. 107, Act of July 16, 1894*).

Section 10 of the Utah Enabling Act further imposed trust restrictions on the school land grant by providing that:

> . . . the lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund.

. . . (*Section 10, 28 Stat. 107, Act of July 16, 1894*).

Finding No. 7: The federal grant in trust to the State of Utah for the support of the public school system was accepted by the State by virtue of protective provisions and guarantees in the Utah Constitution. Section 3, Article X, Constitution of Utah, provides that:

> The proceeds of the sales of all lands that have been or may hereafter be granted by the United States to this state, for the support of the common schools . . . shall be and remain a permanent fund, to be called the State School Fund, the interest of which only, shall be expended for the support of the common schools.

Further, Section 7, Article X, Constitution of Utah, provides that:

> All public school funds shall be guaranteed by the State against loss or diversion.

Finding No. 8: Section 851, Title 43, United States Code, further grants and appropriates federal lands for lieu selection to indemnify States for original school land grants in place that are denied to the States by virtue of federal pre-emption or private entry, by providing that:

> . . . other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers.

Finding No. 9: Section 852, Title 43, United States Code, sets forth the specific criteria and limitations that are applicable to school indemnity selections in exercise of the lieu land grants contained within state enabling acts and in Section 851 of Title 43, United States Code, the pertinent part of which is quoted in Finding No. 8, above. There is no present dispute between the parties as to whether Utah's school indemnity selection lists, as identified in Finding No. 4, above, are in accordance with the statutory criteria contained within Section 852. The Secretary of Interior has made no final determination with respect to such compliance. The parties have stipulated and agreed, in their Stipulation filed with the Court and dated June 10, 1975, that there are no material facts in controversy at this stage of the proceedings, and that the differences which separate the parties are purely questions of law.

Finding No. 10: The basic position of the State of Utah is that Congress has expressly granted and appropriated lands to Utah to be selected as indemnification for original school land grants that the State never received because of federal pre-emption or private entry prior to survey; that the right of selection is in the discretion of the State and not the Secretary of Interior; that upon filing school indemnity selection lists in accordance and compliance with Section 852, Title 43, United States Code, equitable title to the selected lands vests in the State; that the Secretary of Interior has a very narrow range of discretion in reviewing and acting on such selection lists, limited to

a ministerial adjudication to determine only whether such selection lists are in compliance with the statutory criteria of said Section 852; and, if so, the Secretary is obligated by law to approve said selections and to issue a clear list to the lands selected, thus vesting legal title in the State of Utah.

The Secretary of Interior, on the other hand, takes the position that he is authorized and obligated by Section 7 of the Taylor Grazing Act, codified as Section 315(f), Title 43, United States Code, to classify lands located within grazing districts to determine whether they are suitable for school indemnity selection and whether such disposition is appropriate under applicable public-land laws; and that, in making such classification, the Secretary is authorized in his discretion to utilize public interest criteria, including a comparison of the value of the base school lands for which selection is made and the value of the lands selected as indemnification; and, further, that classification in favor of disposition for school indemnity selection is a condition precedent to the vesting of any right, title or interest in any State which makes any such school indemnity selection.

Finding No. 11: The Taylor Grazing Act was enacted as Public Law No. 482, 73rd Congress, Second Session, identified as the Act of June 28, 1934, 48 Stat. 1269, entitled:

> An Act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.

The pertinent part of Section 7 of the 1934 Act provided, with respect to the classification authority of the Secretary of Interior, that:

> . . . the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area.

There is no language in the 1934 Act which purports to give the Secretary of Interior authority to classify lands that are selected by States for indemnification of lost school lands, nor is there anything in the legislative history of the 1934 Act that suggests that Congress intended to require classification as a condition to school indemnity selections.

Finding No. 12: The Taylor Grazing Act was amended in 1936 by Public Law No. 827, Act of June 26, 1936, 49 Stat. 1976 *et seq.* Section 7 of the 1936 Amendment, now codified as 43 U.S.C. 315(f), describes the Secretary's classification authority in the following languages:

> . . . the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands . . . within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than

> for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . .

The lands selected by Utah, as identified in Finding No. 4, above, are located within grazing districts. But there is nothing in the legislative history of the 1936 Amendment to Section 7 of the Taylor Grazing Act to suggest that classification by the Secretary is a prerequisite to the exercise of school indemnity selection rights by the States. If, however, such classification should be deemed to be a prerequisite to school indemnity selection, there are no statutory criteria for classification of school indemnity selections beyond a required determination as to whether the selected lands are proper for acquisition in satisfaction of indemnity selection rights. In particular, there is nothing in Section 7 or the underlying legislative history to suggest that the Secretary is authorized or empowered to utilize public interest criteria, or to compare the value of lost base lands with the value of indemnity selections, as part of any classification procedure.

Finding No. 13: Plaintiff State of Utah contends that compliance by the Secretary with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, is not necessary in connection with the Secretary's action on the school indemnity selection lists, because such Act is inapplicable to such selections. Defendant Secretary of Interior contends that compliance with NEPA is necessary prior to such action because the Secretary has a broad range of discretion in classifying land under Section 7 of the Taylor Grazing Act.

Finding No. 14: Plaintiff State of Utah seeks (a) a declaratory judgment to the effect that equitable title to the selected lands vested in Utah at the dates of the respective filings of the selection lists, if such selection lists were in accordance and compliance with the applicable statutory requirements as set forth in Section 852, Title 43, United States Code; (b) a mandatory injunction requiring the Secretary to proceed forthwith and complete by a date certain his ministerial adjudication to determine whether the selection lists complied with the criteria contained in said Section 852, and to report that determination directly to the Court; and, (c) an order retaining custody, through the registry of the Court, of all funds now on deposit with and invested through the registry of the Court, and requiring all further proceeds from the proto-type oil shale leases to be paid into Court and invested in accordance with the present provisions and conditions governing such investments, as set forth in the applicable orders of the Court; and providing that such deposited and invested funds, together with all

interest earned thereon, be paid to the party entitled thereto when this litigation is fully concluded. Defendant Secretary of Interior opposes all relief sought by the State of Utah.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

Conclusion No. 1: The jurisdiction of this Court is properly invoked under 28 U.S.C. 1331; venue is properly laid under 28 U.S.C. 1391(e)(3); and the relief sought by plaintiff, if otherwise appropriate, is available under 28 U.S.C. 1361, 5 U.S.C. 706(1) and 28 U.S.C. 2201 *et seq.*

Conclusion No. 2: The issues presently in dispute are purely questions of law, no material facts are in controversy, and the matters before the Court may properly be adjudicated and determined in summary judgment proceedings under Rule 56 of the Federal Rules of Civil Procedure.

Conclusion No. 3: Federal land grants in aid of the common schools of the State of Utah create a solemn and permanent public trust for the use, benefit and support of the public school system in Utah. This public trust was created by the United States, as settlor, granting to the State of Utah, as trustee, sections 2, 16, 32 and 36 within each township within the State of Utah for the permanent benefit of the Utah public school system, as beneficiary of the trust. The instruments which created this trust consisted of the Utah Enabling Act, 28 Stat. 107, as passed by

the Congress of the United States, and the Constitution of the State of Utah, which accepted the terms of the trust, as ratified and adopted by the people of the State of Utah.

Conclusion No. 4: When original school land grants in place are denied to the State of Utah as a result of federal pre-emption or private entry prior to survey, the State is entitled to select lands of equal acreage from otherwise unappropriated federal lands within the State, in lieu of and as indemnification for such lost base lands, pursuant to and in accordance with the criteria and limitations set forth in Section 852, Title 43, United States Code. This selection is to be made by the State in accordance with the congressional offer contained in said Section 852; and, when such selections are duly filed, it is the duty of the Secretary of Interior to make a ministerial adjudication of such selection lists to determine whether they are in accordance with the requirements of said Section 852. If so, the Secretary must honor the state's acceptance of the congressional offer, and thus fulfill the purpose of the public school land trust, by approving said selections; but, if such selections are found not to be in compliance with the congressional criteria contained in said Section 852, the Secretary must deny and reject such selection lists.

Conclusion No. 5: If the ministerial adjudication of the school indemnity selection lists, as conducted by the Secretary under said Section 852, reveals that said selection lists were in fact in compliance with said Section 852, then Utah would have acquired equit-

able title to the lands so selected as of the dates the respective selection lists were filed, and from and after that date Utah would have been entitled to all revenues, rentals, emoluments and benefits arising or accruing from said lands from and after the respective dates when such selection lists were filed.

Conclusion No. 6: The language of Section 7 of the Taylor Grazing Act, as amended in 1936 (codified as 43 U.S.C. 315(f)), cannot reasonably be construed to require classification of lands within grazing districts as proper for disposition in satisfaction of school indemnity selection lists filed under Section 852 of Title 43, U.S.C.; and there is nothing in the legislative history of the Taylor Grazing Act which indicates or suggests that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the Taylor Grazing Act.

Conclusion No. 7: Even if it should be assumed that Section 7 of the Taylor Grazing Act could be construed so as to require classification prior to disposition of land within a grazing district in satisfaction of school indemnity rights, such a classification would not be a condition precedent to the vesting of equitable title in the State of Utah as of the respective dates that the selection lists were filed; and, further, the criteria which would govern the Secretary in making such classification would be exactly the same as those which he is obligated to utilize in making his ministerial adjudication under Section 852 of Title 43, U.S.C. This result necessarily follows from the fact that Section 7 (43 U.S.C. 315(f)) requires the Secretary, in making any such classification for lieu selections, to determine whether the selected lands are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . ." The Secretary is accorded no other or greater range of discretion, and no other criteria are provided by the statute. The Secretary's determination as to whether selected lands are "proper for acquisition" by the State in satisfaction of its indemnity rights would have to be measured by the requirements for such acquisition as set forth in the "applicable public-land law." The applicable public-land law for school indemnity selections is 43 U.S.C. 852, and any classification of lands made by the Secretary under Section 7 for disposition in satisfaction of school indemnity selections would, of necessity, be the same in nature, substance and range of discretion as the ministerial adjudication performed under Section 852. It is for this reason that the result would be exactly the same whether the Secretary merely conducts the ministerial adjudication of school indemnity lists required under Section 852, or whether he conducts both the adjudication under Section 852 and the hypothetical classification under Section 7 (43 U.S.C. 315(f)). Since the law does not require the Secretary to do a useless act, and since there would be no point, purpose or benefit in a separate "classification" under Section 7, the Secretary is not required to "classify" the school indemnity selection lands in

this action, but should proceed merely to conduct the ministerial adjudication required by 43 U.S.C. 852. Nothing in this Conclusion of Law No. 7 shall be construed as an indication that school indemnity selections are within the scope of the Taylor Grazing Act; and it is expressly concluded that school indemnity selections are not within the scope of, or subject to, that Act.

Conclusion No. 8: Any and all regulations promulgated by the Secretary of the Interior inconsistent with these Conclusions of Law, and, in particular, any provisions within Part 2620 or Part 2400, 43 C.F.R., that purport to require classification under the Taylor Grazing Act of school indemnity selections filed under 43 U.S.C. 852, are without authority of law, are contrary to law, and are void and of no force or effect.

Conclusion No. 9: In view of the narrow, confined, ministerial range of discretion conferred on the Secretary under Section 852 of Title 43, U.S.C., and by Section 315f of Title 43, U.S.C. (if, indeed, the latter section could be construed to apply at all), the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, does not apply to secretarial review and action on school indemnity selection lists. The Secretary must approve those selections if they are in accordance with the congressional grant, appropriation and offer contained in the Utah Enabling Act, 28 Stat. 107, and Sections 851 and 852 of Title 43, U.S.C.

Conclusion No. 10: While federal land grants ordinarily are to be narrowly construed in favor of the United States and against the grantee, the reverse

rule holds true with respect to school land grants and indemnity selections. With respect to public school land grants and indemnity selections, the courts will adopt a liberal interpretation of the applicable statutes in order to honor and fulfill the public trust in aid support of the common schools, and thus achieve the purpose intended by Congress in granting school trust lands.

Conclusion No. 11: The Secretary's failure to take any final action on any of Utah's school indemnity selection lists which are the subject of this litigation, even though many of such selections have been pending before the Secretary for more than ten years, is "agency action unlawfully withheld or unreasonably delayed" within the meaning of Section 706(1), Title 28, U.S.C.

Conclusion No. 12: Plaintiff State of Utah is entitled to judgment in this proceeding, as follows:

a. A declaratory judgment to the effect that equitable title to the selected school indemnity lands vested in the State of Utah at the dates of respective filings of the selection lists, as set forth in Finding of Fact No. 4, if it is determined by the Secretary that such selection lists were in accordance and compliance with the applicable statutory requirements as set forth in Section 852, Title 43, U.S.C.; and that, if such selection lists so complied with the statutory criteria of said Section 852, Utah is and has been entitled to all revenues, rentals, emoluments and benefits derived from said selected lands from and after the respective dates when such selection lists were filed.

b. A mandatory injunction requiring the Secretary to proceed forthwith and complete a ministerial adjudication by a date certain of Utah's school indemnity selection lists; and requiring the Secretary to conduct such administrative adjudication by confining his discretion to a determination as to whether the congressionally mandated criteria of Section 852, Title 43, U.S.C., have been complied with and satisfied by such selection lists.

c. An order retaining custody by the Court, through the registry of the Court, of all funds now on deposit and invested through the registry of the Court, as derived from the proto-type oil shale leases now in effect on part of the selected lands; and requiring all further proceeds from said oil shale leases to be paid into Court and invested in accordance with the present provisions and conditions governing such investments, as set forth in the applicable orders of the Court as previously made and entered; and providing that all such funds, together with all interest earned thereon, be paid to the party entitled thereto, pursuant to further order of the Court when this litigation is fully concluded on the merits.

From the foregoing Findings of Fact and Conclusions of Law, and in accordance therewith, the Court now makes the following:

JUDGMENT AND DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff State of Utah received equitable title to the 157,255.90 acres of school indemnity

lands selected in Uintah County, State of Utah, and identified and described in Finding of Fact No. 4, *supra*, at the dates that the respective selection lists were filed, if it is determined by the Secretary of the Interior that such selection lists were in accordance and compliance with the requirements of 43 U.S.C. 852.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the Secretary finds and determines that said selection lists were in compliance with 43 U.S.C. 852, so that Utah thus became the equitable owner of such lands at the dates that the respective selection lists were filed, that Utah thereupon became entitled, from and after such dates, to all revenues, rentals, emoluments and benefits derived from said selected lands.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of Interior should, and he is hereby Ordered to, proceed forthwith to conduct a ministerial, administrative adjudication, and to complete the same not later than December 15, 1976, of Utah's school indemnity selection lists; and, in so doing, to confine his administrative discretion to a determination as to whether those selection lists are in factual compliance with the requirements of 43 U.S.C. 852, and to refrain from applying any measure of comparative or disparate value between the base lands and the selected lands; and, if the Secretary has not completed such ministerial adjudication of Utah's school indemnity selection lists by said date, he is

hereby Ordered to appear before this Court at 10:00 a.m. on said December 15, 1976, and then and there show cause, if any he has why he should not be held in contempt for failure to complete such ministerial adjudication of the school indemnity selection lists.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any and all regulations promulgated by the Secretary of Interior that purport to require classification under Section 7 of the Taylor Grazing Act (43 U.S.C. 315f) of lands selected in satisfaction of school indemnity rights filed by Utah under 43 U.S.C. 852, and, in particular, any provision within Part 2620 or Part 2400 of 43 C.F.R. that is so construed or interpreted by the Secretary, are, and are adjudicated and declared to be, without authority of law, contrary to law, and void and of no legal force or effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of the Interior shall, during the entire pendency of this action, deposit all rentals, bonus payments, and other proceeds and benefits of any kind and description, as and when received from the proto-type oil shale lessees, with the Court through the registry of the Court; that all such funds and proceeds heretofore deposited with the Court shall remain in the custody of the Court during the pendency of this action; that all funds previously deposited and invested will be periodically reinvested in accordance with the Order of this Court, and all funds hereafter deposited with the Court through the

registry of the Court shall be invested in accordance with the present provisions, conditions and safeguards as are set forth in the applicable orders of this Court as previously made and entered; and that all such funds, together with all interest earned thereon, shall be paid to the party entitled thereto pursuant to the further Order of this Court, when this litigation is fully and finally concluded on the merits.

Dated this 8 day of January, 1976.

By: /s/ Willis W. Ritter
WILLIS W. RITTER
Chief Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 76-1839

(D.C. No. C-74-64)

AUGUST TERM—August 8, 1978

Before Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

THE STATE OF UTAH, by and through
its Division of State Lands, PLAINTIFF-APPELLEE

vs.

THOMAS S. KLEPPE, individually and as
Secretary of the United States
Department of Interior, DEFENDANT-APPELLANT

JUSTHEIM PETROLEUM COMPANY,
STATE OF IDAHO, AMICI CURIAE

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX E

NOVEMBER TERM—December 6, 1978

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle and Honorable James K. Logan, Circuit Judges

No. 76-1839

THE STATE OF UTAH, by and through
its Division of State Lands, PLAINTIFF-APPELLEE

vs.

THOMAS S. KLEPPE, individually and as
Secretary of the United States
Department of Interior, DEFENDANT-APPELLANT

JUSTHEIM PETROLEUM COMPANY,
STATE OF IDAHO, AMICI CURIAE

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by the appellant.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges McWilliams, Barrett and Doyle to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal

Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

By: /s/ Robert L. Hoecker
ROBERT L. HOECKER
Chief Deputy

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